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No. 99-7720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

CAPITAL CASE

QUESTIONS PRESENTED

Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) reforms many of the rules governing federal habeas corpus review of state death penalty judgments, but applies only if the state meets certain conditions, including providing state-law "standards of competency for the appointment" of counsel in state collateral review proceedings. In a decision that otherwise rests on several disputed assumptions of state law, the court of appeals determined that California fails to qualify because its counsel competency standards are insufficiently "binding and mandatory"—a "requirement" the court found "implicit" in Chapter 154. Having disqualified California on this ground, the court deemed none of the disputed state-law questions "determinative," and denied the state's motion to certify them to the California Supreme Court for authoritative resolution. The questions presented in this petition are:

1. Whether, as a condition of complying with Chapter 154, states are implicitly required to fashion counsel competency standards that allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations.

2. Whether the court of appeals erred by failing to certify disputed state-law questions to the state supreme court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of California, on behalf of Jeanne S. Woodford, Acting Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 24a-42a) is reported at 202 F.3d 1160. An order amending that opinion and the amended opinion reflecting that order (Pet. App. 1a-22a) are reported at ___ F.3d ___ (2000 WL 256627). The opinion of the district court (Pet. App. 43a-78a) is reported at 31 F. Supp. 2d 1175.

JURISDICTION

The Court of Appeals entered its judgment on January 24, 2000. A petition for rehearing and rehearing en banc was denied on March 9, 2000. Pet. App. 4a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Relevant portions of Chapter 154, 28 U.S.C. §§ 2261, 2265, are reproduced in the Appendix to this petition, see Pet. App. 79a-82a, as are the following relevant provisions of California law: (1) Cal. Gov't Code § 68511.5 (West Supp. 1997); (2) Cal. Rules of Court, rule 76.5 (West 1996); (3) Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20 (West 1996); (4) Cal. Sup. Ct. Policies Regarding Cases Arising From Judgments of Death (West 1996); and (5) Cal. Gov't Code § 68070 (West Supp. 1997). See Pet. App. 83a-94a. Also included in the Appendix are instructive provisions of federal law and of the law of other capital jurisdictions. See *id.* at 95a-172a.

STATEMENT

Chapter 154 reforms federal habeas corpus review of final death judgments that originate in qualifying states. This case concerns whether, as a condition of complying with Chapter 154, states are required to fashion counsel competency standards that allow no exceptions, no opportunity for departure, and no occasion for the exercise of state judicial discretion. The United States Court of Appeals for the Ninth Circuit found that Congress made such a requirement "implicit" when it specified, in 28 U.S.C. § 2265, that qualifying states must provide, by statute or rule of court of last resort, "standards of competency for the appointment" of state collateral counsel in capital cases. The court also disqualified California based on its belief that the provisions of state law establishing the state's mechanism for the appointment of capital collateral counsel and providing standards of competency for such appointments are neither "rules of court" nor "statutes." Each of these alternative grounds, however, rests on assumptions about California law that are contrary to the understanding of the California Attorney General. Insisting that its disputed pronouncements of state law were neither "novel" nor "determinative," the Ninth Circuit denied the state's motion to certify those matters to the California Supreme Court for authoritative resolution.

The question of California's compliance with Chapter 154 was presented to the district and circuit courts following this Court's decision in *Calderon v. Ashmus*, 523 U.S. 740 (1998), to which respondent, a California prisoner pursuing a collateral attack on his 1986 death judgment, was also a party. Respondent's federal habeas corpus proceedings, initiated under 28 U.S.C. § 2254, have been pending in the United States District Court for the Northern District of California since 1993.

1. More than 30 years ago, the California Supreme Court conferred upon death-sentenced prisoners a state-law right to the assistance of appointed counsel in state postconviction collateral review proceedings "undertaken between the termination of their state appeals and their execution." *In re Anderson*, 69 Cal. 2d 613, 633 (1968). Under California law, collateral counsel, like counsel appointed by a state appellate court for any other purpose, are statutorily guaranteed "a reasonable sum for compensation and necessary expenses." Cal. Penal Code § 1241. On June 6, 1989, the California Supreme Court issued its Policies Regarding Cases Arising From Judgments of Death, see Supreme Court, Cal. Rules of Court, Court Rules Vol. 23 pt. 3, at 143 (West 1996), which systematically extended the state-law guarantee of collateral representation to all death-sentenced prisoners "whether the appeals * * * are pending or previously resolved," Pet. App. 89a; the Policies effected that change in state law by directly and immediately "impos[ing] an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus." *In re Clark*, 5 Cal. 4th 750, 783 (1993).[1/]

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1. Thus, the attorneys assigned to the appeal presumptively also served as the prisoner's collateral counsel. This presumption was reversed by changes in state law that became effective in 1998; for cases in which appointments are made thereafter, the duties of appellate and collateral representation are divided between different counsel, unless the prisoner and counsel expressly request otherwise. See Cal. Gov't Code § 68663 (West Supp. 2000). In all other respects, the essential structure of California's capital review mechanism has remained unchanged since June 6, 1989—the date on which the state maintains it perfected its Chapter 154-qualifying capital review mechanism. See also note 10, *infra*. Of

Appointment of capital counsel by the California Supreme Court had, since 1985, been governed by the competency criteria specified in Section 20(c) of the Standards of Judicial Administration, see Appen. to Cal. Rules of Court, Court Rules Vol. 23, pt. 2, at 679-680 (West 1996). See also Cal. Gov't Code § 68511.5 (Pet. App. 83a). The standards (Pet. App. 87a) specify as follows:

> **(c) [Supreme Court]** The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

These standards were promulgated pursuant to California Rule of Court 76.5 (Pet. App. 84a-85a), which reads as follows:

> **Rule 76.5. Appointment of counsel in criminal appeals**
>
> **(a) [Procedures]** Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.
>
> **(b) [Lists of qualified attorneys]** On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more

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California's 570 death-sentenced prisoners, approximately 340 had counsel appointed before 1998; of those, approximately 300 (including respondent) had their judgments affirmed after June 6, 1989.

lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

2. On May 19, 1984, respondent sexually attacked and murdered a seven-year-old girl in a public park in Sacramento, California. He was tried and sentenced to death in 1986. In March 1987—more than two years after adoption of the Section 20 standards—the California Supreme Court appointed counsel to represent respondent in that court. In December 1991—more than two years after implementation of the Death Penalty Policies—the California Supreme Court unanimously affirmed respondent's death judgment. *People v. Ashmus*, 54 Cal. 3d 932 (1991), cert. denied 506 U.S. 841 (1992).

3. On February 17, 1993, respondent sought appointment of new counsel from the federal district court, which immediately stayed the execution that had been scheduled for March 12, 1993. The federal proceedings remain pending. Record, Doc. Nos. 1-265.

4. On April 24, 1996, the AEDPA went into effect. Enacted to expedite capital habeas cases, see *Lindh v. Murphy*, 521 U.S. 320, 331 (1997), and to address the "perceived acquiescence in capital defendants' dilatory tactics by some federal courts," *id.* at 338 (Rehnquist, C.J., dissenting), Chapter 154 of the AEDPA implemented immediately-effective reforms governing federal review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Id.* at 327. Because California law authorizes death-sentenced prisoners "to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack," the state is a "unitary review" jurisdiction within the meaning of 28 U.S.C. § 2265(a). See Pet. App. 6a n.3, 8a, 81a. Thus, to qualify under Chapter 154, California must have "established by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel," and the rule of court or statute must "provide standards of competency for the appointment of such counsel." Further, the state's mechanism must include an offer of counsel and entry of an order providing appointment unless the prisoner is not indigent or enters a valid waiver. *Id.* at 79a, 81a.

5. a. On the day of the AEDPA's enactment, respondent filed a class action civil rights suit against various state officials, see 42 U.S.C. § 1983, challenging application of Chapter 154 in California and seeking declaratory and injunctive remedies to prevent its enforcement in any federal court. Without addressing the state's claim of immunity under the Eleventh Amendment, the district court issued the requested injunction, *Ashmus v. Calderon*, 935 F. Supp. 1048 (N.D. Cal. 1996), and declared that California's capital review procedures failed to satisfy Chapter 154 in five respects.

First, the court observed that the California Supreme Court does not authorize state counsel to undertake "fishing expeditions" to uncover "*any*" basis for a collateral claim; rather, counsel first must identify facts "suggesting that a basis for habeas corpus relief may exist." While recognizing that this policy imposes a "sensible" limitation on the expenditure of public money, the district court nevertheless found it "objectively deficient" because, according to that court's understanding of state law, counsel are authorized to pursue only those collateral issues "that are knowable by reference to the four corners of the appellate record." 935 F. Supp. at 1070-1071. Furthermore, the district court observed that many death row inmates in California had requested, but not yet received, appointed counsel. Because California does not appoint counsel "immediate[ly]," the district court reasoned, the state fails to make appointments "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.* at 1074-1075. The court also determined that California lacked qualifying competency standards for counsel inasmuch as the applicable standards appear in Section 20 of the Standards of Judicial Administration and that provision is, according to the district court's understanding of state law, neither a "rule of court" nor a "statute." *Id.* at 1072-1074. "[R]elatedly," the court also decreed that section 20's standards are not sufficiently "binding or mandatory" and the state had "provided [no] indication that the Supreme Court has followed § 20(c)'s recommendation and adopted these standards as binding upon itself." *Id.* at 1073-1074. Finally, the standards were deemed substantively deficient because they make "no mention of original habeas proceedings and * * * require[] no minimum experience whatsoever in habeas proceedings." *Id.* at 1074.

b. The Ninth Circuit, in a 2-1 decision, "reluctant[ly]" rejected the last point, *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (1997), but otherwise agreed and affirmed. *Id.* at 1207-1208; see *id.* at 1208 ("California has presented no evidence indicating that the State actually follows the relied-upon standards when appointing counsel for condemned inmates"). The court denied the state's Eleventh Amendment immunity claim, reasoning that "California's announced intention to

invoke Chapter 154 without having complied with that Chapter's opt-in requirements * * * threatens to violate" the federal rights of capital prisoners. *Id.* at 1204-1206. The dissent concluded that respondent's suit was barred by the Eleventh Amendment. *Id.* at 1209-1210 (Beezer, J.).

c. This Court granted certiorari, 522 U.S. 1011 (1997), and unanimously reversed. *Calderon v. Ashmus*, 523 U.S. 740. Addressing respondent's theory that state officials had violated his federal rights, the Court observed that "California's assertions on Chapter 154 have no coercive impact on the legal obligations of either party." *Id.* at 749. Describing respondent's suit as an improper effort "to gain a litigation advantage," the Court ordered it dismissed for want of Article III jurisdiction. *Id.* at 747, 749. Death-sentenced prisoners, the Court observed, "obviously can litigate California's compliance with Chapter 154" in the regular course of habeas proceedings. *Id.* at 748. On remand, the Ninth Circuit vacated its earlier decision, reversed the judgment of the district court, and remanded to that court with directions to dismiss the complaint. 148 F.3d 1179-1180 (1998).

6. On September 22, 1998, the state filed a motion in respondent's habeas proceeding, seeking the district court's permission to brief Chapter 154's application. Record, Doc. No. 229. Permission was eventually granted,[2/] and on

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2. While the state's request was pending, the district court, on October 9, entered an order in the civil rights proceeding, purporting to dismiss only respondent's "cause of action under the Declaratory Judgment Act"; it further ordered that the 1996 injunction barring state officials from urging application of Chapter 154 would "stand[] pending a ruling on the viability of [respondent's] section 1983 action." Record in N.D. Cal. No. 96-1533-TEH, Doc. No. 76. Accordingly, on October 16, the state's request was denied without prejudice: "If and when the preliminary injunction in the class action case is dissolved," the district court ordered, the state "may renew its [a]pplication." Record in N.D. Cal. No. 93-0594-TEH, Doc. No. 231. That same day, Justice O'Connor issued a temporary stay of the district court's October 9 order, and on October 20, the district court, noting that stay, vacated its October 16 order and granted the state's request to brief the Chapter 154 issue. *Id.*, Doc. No. 232. On October 26, the state filed its Chapter 154 briefing in the district court, *id.*, Doc. No. 236, and the

December 24, 1998, the district court issued an order in the habeas proceeding declaring, for largely the same reasons it had adopted in the earlier civil rights suit, that California's capital review process does not comply with Chapter 154. Pet. App. 63a-65a (failure of "immediate" appointments), 65a-66a (finding no "binding," "mandatory," or "legally enforceable" state-law right to collateral counsel), 68a-70a (finding the state's anti-"fishing expedition" rule incompatible with the requirement of reasonable funding)[3], 71a-78a (finding the state's competency standards insufficiently "binding and mandatory"; "the state supreme court's reliance on section 20 in practice does not raise section 20 to the status of a qualifying

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state's application before this Court for an order enjoining enforcement of the district court's October 9 order was denied without prejudice. On October 28, the district court finally dismissed the civil rights suit outright and formally dissolved the 1996 injunction. Record in N.D. Cal. No. 96-1533-TEH, Doc. No. 81.

3. Four months before the district court's second Chapter 154 ruling, the California Supreme Court decided *In re Robbins*, 18 Cal. 4th 770 (1998), which explicitly corrected the misimpression that collateral investigation and funding in California is circumscribed by a "four corners rule." *Id.* at 793 n.15. In the wake of *Robbins*, the district court revised its analysis to identify a new and different "defect" in California's funding regimen: the rule that conditions funding on the identification of "specific issues to be explored and specific facts which suggest that a basis for a potentially meritorious habeas corpus claim exists." Pet. App. 65a, 68a n.25 ("California's mechanism for compensation and payment of habeas counsel is inadequate even if, as [the state] claims, the 1989 Policies do not restrict compensation to claims discoverable 'within the four corner[s] of the appellate record.'"); compare 935 F. Supp. at 1071. Similarly, the district court had earlier doubted whether "the California Supreme has followed § 20(c)'s recommendation and adopted these standards as binding upon itself." Pet. App. 175a. Later presented with "evidence that, in practice, the Supreme Court uses section 20 as the 'initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal,'" the district court concluded that "the state supreme court's reliance on section 20 in practice does not raise section 20 to the status of a qualifying procedure." *Id.* at 77a. There are other differences between the district court's two orders; in light of the subsequent decision of the Ninth Circuit, however, few of those differences appear to be of any enduring significance.

procedure"); *id.* at 71a (incorporating by reference the analysis formerly set forth at 935 F. Supp. at 1072-1074 (reproduced at Pet. App. 173a-179a)). Concerning the meaning of "binding and mandatory," the court offered the following amplification:

> Mandatory * * * does not mean discretionless. It simply means that the competency standards must establish a clear and obligatory baseline of competence. In this sense, the requirement that competency standards be mandatory is but a subset of the requirement that standards be provided by rule of court or statute, i.e., provided by procedures which *carry the force of law.*

Id. at 72a n.29 (emphasis added).

7. The state appealed, and urged the Ninth Circuit to certify to the California Supreme Court the following state-law questions, each of which the district court order had expressly or impliedly resolved contrary to the position advanced by the California Attorney General: (a) whether the California Supreme Court's Payment Guidelines for Appointed Counsel Representing Indigent Criminal Defendants contravene California Penal Code § 1241's explicit guarantee of "a reasonable sum for compensation and necessary expenses," and (b) whether the Payment Guidelines, the Death Penalty Policies, and the Section 20 standards had been adopted as "rules of court" pursuant to any provision of state law, including but not limited to California Government Code § 68070 (authorizing every court to adopt its own rules, see Pet. App. 94a) State's C.A. Mot. to Cert. State Law Questions to the Cal. Sup. Ct. 6-7.[4] The Ninth Circuit denied the state's motion, and affirmed. Of primary importance for present purposes, the

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4. California law permits the state supreme court to "answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth provided that [¶] (1) the certifying court requests the answer; [¶] (2) the questions may be determinative of a cause pending in the certifying court; and [¶] (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question." Cal. R. Ct. 29.5.

court held, purely as a matter of federal statutory construction, that Chapter 154 "implicitly" forecloses qualifying states from specifying any exceptions to their counsel appointment standards or allowing the state's judiciary to inform the administration of those standards with discretionary considerations. Pet. App. 17a, 20a.

a. The Ninth Circuit did not decide whether the district court had correctly concluded that Chapter 154 compliance requires "immediate" appointment of state collateral counsel. Nor did it review the district court's determination that California fails to compensate collateral counsel for "reasonable litigation expenses." Pet. App. 10a n.6; *id.* at 12a-13a n.8.[5/] Instead, based on its understanding of California law in effect

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5. The Ninth Circuit also declined to consider respondent's assertion that Chapter 154 could not be applied to his federal proceedings even if, as the state maintained, California perfected compliance on June 6, 1989, when, some 30 months before respondent's conviction was affirmed on direct appeal, the state supreme court *immediately and systematically extended the benefit of collateral representation* to respondent and all other prisoners whose capital appeals were then pending or previously resolved. Under respondent's analysis, in order for Chapter 154 to apply, California needed to have established a collateral appointment mechanism no later than March 27, 1987, when counsel was appointed to represent him on direct appeal—*i.e.*, 27 months *before* the district court believed the opportunity to litigate collateral claims in a "unitary" context had even come into existence. See Pet. App. 60a-61a. The district court accepted respondent's analysis (effectively penalizing California for *accelerating* the point at which the state-law right to collateral counsel attaches), *id.* at 54a-55a, but the Ninth Circuit determined that it "need not decide which date is correct." *Id.* at 12a. Had the Ninth Circuit adopted respondent's view, it would have produced an evident split of authority. See *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) (compliance not demonstrated by procedures "not yet set up" at time state petition was *denied*); see also *Wright v. Angelone*, 944 F. Supp. 460, 463 (E.D. Va. 1996) (compliance should be determined by reference to the state system as it existed "at the time a petitioner *first received appointment of counsel in the post-conviction process*") (emphasis added)); *Weeks v. Angelone*, 4 F. Supp. 2d 497, 506 (E.D. Va. 1998) (compliance criteria relating to appointment plainly satisfied because change in state law that made appointment of collateral counsel "automatic" predated both appointment of counsel *for collateral proceedings* and the finality of those proceedings).

between 1989 and 1998 (see note 1, *supra)*, the court first ruled Chapter 154 inapplicable because the state "failed to establish its appointment mechanism 'by rule of its court of last resort or by statute' as required by 28 U.S.C. § 2265(a)." Pet. App. 12a. In its initial opinion, the court explicitly rested this conclusion on two assumptions of state law: (1) "California's appointment mechanism was established only in its 1989 Supreme Court Policies and Rule XIII (subsequently Rule XIV) of the Internal Operating Practices and Procedures (IOPPs) of the Supreme Court of California," and (2) neither the Policies nor Rule XIII "is a rule of court or statute" or, therefore, "binding and mandatory." *Id.* at 33a-34a (explicitly "contrast[ing]" Rule XIII and the Policies with, *inter alia*, "numerous provisions of the decisional law" which *are* "mandatory and binding"). "Chapter 154 * * * requires a mandatory and binding appointment mechanism," the court declared, "and, at all times relevant to Ashmus, California failed to provide one." *Id.* at 35a.

The court did not initially cite or discuss the California Supreme Court's 1968 decision in *Anderson*, which created the state-law right to collateral representation in capital cases (although the court otherwise acknowledged the "binding and mandatory" character of state decisional law generally, see *id.* at 34a). The court also did not initially cite or discuss the 1999 decision in *In re Sanders*, 21 Cal. 4th 697 (1999) (cited and copied to the court pursuant Fed. R. App. P. 28(j) on Sept. 23, 1999), which both (1) explains that *Anderson*, the IOPPs, and the Policies are among the provisions of California law that "all require" the appointment of capital collateral counsel, and (2) refers to the Death Penalty Policies as "rules" no fewer than 14 times. 21 Cal. 4th at 704, 706, 707-711, 713, 716-721, 723. In a footnote, the Ninth Circuit acknowledged that Congress was familiar with California's Death Penalty Policies and that the legislative history of Chapter 154 also refers to the Policies as a "rule of [the state's] supreme court," but the Ninth Circuit dismissed this reference as "isolated" and contrary to the "plain meaning of the statute and California's rules, policies, procedures, and policies [sic]." Pet. App. 13a n.9. The court further acknowledged that California Government Code § 68511.5 (a statute) "directs the [state] Judicial Council to 'adopt rules of

court regulating the selection of appointed counsel,'" and that California Rule of Court 76.5 (a rule) in turn "requires each appellate court to 'adopt procedures for appointment of counsel in criminal cases'"; these provisions, the court nevertheless concluded, did not "establish" California's appointment mechanism because neither "embodie[s]" the mechanism or "itself contain[s]" the state's procedures. Pet. App. 15a-16a.[6/]

b. As a second ground for disqualifying California, the Ninth Circuit concluded that the state has no "statute or rule of court providing standards of competency for the appointment of collateral counsel." Pet. App. 17a. The court construed Chapter 154 to impose two requirements in this regard: First, in order to "provide" standards within the meaning of Chapter 154, the relevant state statute or rule must "contain"—not merely "authorize"—the standards. Although the district court had distilled such a requirement by "direct implication," *id.* at 77a-78a, the Ninth Circuit deemed it to be "expressly state[d]" in Chapter 154. *Id.* at 17a. Second, "[t]he statute and legislative history also require that such standards be binding and mandatory." Unlike the district court, however, the Ninth Circuit did not define *its* "binding and mandatory" requirement as merely "a subset of the requirement that competency standards be provided by rule of court or statute, i.e., provided by procedures which carry the force of [state] law"; rather, under the Ninth Circuit's analysis, state-law definitions were not "determinative." The court characterized this second requirement as "implicit[]." *Ibid.*

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6. In another footnote, the court expressed doubts whether § 68511.5 and rule 76.5 had any relevance at all since both "refer to 'criminal appeals,' not post-conviction proceedings," and § 68511.5 "refers to the 'appointment of counsel in all *appellate districts*,' which is a clear reference to the intermediate state appellate courts, rather than the state supreme court." Pet. App. 16a n.12 (emphasis by court). The court would later reiterate that § 68511.5 "contemplates the appointment of counsel on direct, not collateral, appeal." *Id.* at 21a. But see *id.* at 5a ("'[a]ppellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus'") (quoting Death Penalty Policy 3.1.1-1 (Pet. App. 89a)); see also note 12, *infra*.

i. The "express" requirement that the rule or statute actually "contain" the state's competency standards derives, according to the Ninth Circuit, from Congress's choice of the word "provide." Pet. App. 17a, 21a. Believing "provide" to have an "unambiguous meaning," the court rejected the construction that a rule or statute might "provide" standards by authorizing their promulgation in some other legal instrument. *Id.* at 20a-21a. Thus, while acknowledging that § 68511.5 and rule 76.5 explicitly "requir[e] the adoption of 'procedures for the appointment of [appellate] counsel'" the court reasoned that they do not "provide" (or "require") competency standards for collateral counsel. "[A]t best," the court discerned, "they merely permit them." *Id.* at 21a.

Having rejected any definition of "provide" other than "contain," the court resolved that California could qualify under Chapter 154 only if Section 20 of the Standards of Judicial Administration were itself a "rule," for that is where California's competency standards "are set out." Pet. App. 18a. The court then concluded:

> Section 20 is not a rule of court or statute, however. It is neither binding nor mandatory. Section 20 uses hortatory language—"should." * * * Section 20 is thus a "'recommendation[] to the courts'" made under the Judicial Council's authority to make recommendations under the state constitution; it is not a rule of court. * * * Also, as a recommendation to the Court, section 20 cannot be considered mandatory or binding. * * * Section 20 is not, therefore, a qualifying competency standard within the meaning of 28 U.S.C. § 2265(a) * * * *

Id. at 18a-19a (citations and footnote omitted). The Ninth Circuit acknowledged that state *courts* are *independently* authorized under California Government Code § 68070 to adopt their *own* rules. See *id.* at 94a. The court also acknowledged evidence that the California Supreme Court uses Section 20 "as an 'initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal.'" *Id.* at 20a (citing district court opinion); see *id.* at 77a; State C.A. Excerpt of Rec. 138-139 (sample correspondence from

California Supreme Court to capital counsel applicants); *id.* at 157 (Report of Judicial Council Advisory Committee). Yet the proposition that the Section 20 standards had acquired dignity as a rule of court under state law by virtue of the state supreme court's adoption of them under § 68070 was dismissed with three observations: (1) the state had presented "no evidence that section 20 was actually promulgated under that code section," (2) the view that Section 20 came to be adopted under § 68070 "is directly contradicted" by the fact that Section 20 was initially issued by the Judicial Council as a "recommendation to the courts" and "not a rule of court at all," and (3) "the California Supreme Court's compliance in practice" with Section 20 would not meet "the federal statutory command." Pet. App. at 19a, 20a. The Ninth Circuit did not identify any state authority under which the California Supreme Court could have adopted the Section 20 standards *other than* § 68070 (and petitioner knows of none).

ii. Alternatively, and without regard to the Section 20 standards' character as rules within the meaning of state law, the Ninth Circuit determined those standards still would not satisfy the "implicit" federal statutory requirement that they be "binding and mandatory." No rule, according to the Ninth Circuit, is sufficiently "binding and mandatory" for Chapter 154 purposes if judicial discretion is allowed to inform its application or if it is subject to exceptions and discretionary departures. *Id.* at 17a ("the decision to follow the standards [is] left to the discretion of a court or guideline administrator"); *id.* at 20a ("the section 20 guidelines need not be applied in any form if the court contracts with an 'administrator' to supervise the appointed counsel, * * * and the State points to no standards of competency for such an administrator"). Allowing state judicial discretion to inform the application of state competency standards, the Ninth Circuit reasoned, would "eviscerate[]" Chapter 154's requirement of competent counsel and "necessitate a case-by-case analysis [by federal courts] to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid." *Id.* at 17a. While acknowledging, in part, that Congress intended to afford the states considerable "latitude" in developing qualify-

ing standards, the court concluded that this concern did not extend to matters of application; rather, Congress's concern for the states' "latitude" was confined to the substance of their standards. *Id.* at 20a n.18.

c. Explaining its refusal to certify any of the disputed state-law questions on which it made pronouncements, the court deemed those questions, while "relevant," neither "determinative" nor "novel." The court further stated that the ultimate issue under review—compliance with Chapter 154—was "manifestly a question of federal statutory interpretation" which the California Supreme Court was "in no better position" to resolve. Pet. App. at 10a-11a n.6.

d. The state sought rehearing and rehearing en banc, pointing out that the panel decision contained numerous errors of state and federal law. The state also filed a second motion to certify questions of state law, and noted that the California Supreme Court then had pending before it the question of that court's authority to adopt its Death Penalty Policies pursuant to the rulemaking power conferred under § 68070. Pet. for Reh'g 1-15; State's Second Mot. to Certify State Law Questions 1-4.

e. On February 8, 2000, the panel denied the state's second certification motion. Pet. App. 23a. The petition for rehearing and rehearing en banc was denied on March 9, 2000. *Id.* at 4a. By order of that same date, the court amended the opinion to delete the discussion culminating in the conclusion that "at all times relevant" to respondent, "California failed to provide" a "mandatory and binding appointment mechanism." *Id.* at 2a. The deleted discussion was replaced with a passage acknowledging that appointment of state collateral counsel in capital cases is indeed "a requirement of state law." With citation to *Sanders*, the amended opinion further acknowledges that this state-law requirement derives from, *inter alia,* the California Supreme Court's 1968 decision in *Anderson*—the "binding and mandatory" character of which had earlier been noted. Nevertheless, the amended opinion concludes that "[e]stablishment by decision is not enough" because Chapter 154 requires establishment of the counsel appointment mechanism "by rule of * * * court of last resort or by statute." *Id.* at 2a-3a. The amended opinion does *not* acknowledge that

appointment of capital counsel is *also* required by the California Supreme Court's Death Penalty Policies. Compare *id.* at 2a ("*Sanders* states that *Anderson*, the IOPPs, and the 1998 statute 'all require' appointment of capital collateral counsel") with *Sanders*, 21 Cal. 4th at 719 ((i) "*In re Anderson* * * *, (ii) this court's own Internal Operating Practices, (iii) *policy 3 of the Supreme Court Policies*, and now (iv) Government Code section 68662 all require such appointment") (emphasis added). And although the amended opinion reasserts that the Policies "are not rules" of the California Supreme Court, Pet. App. 2a-3a, it does not address the fact that the California Supreme Court repeatedly referred to them as rules throughout *Sanders*.

REASONS FOR GRANTING THE PETITION

The court of appeals has held that Chapter 154 "implicitly" requires qualifying states to fashion counsel competency standards that are "binding and mandatory" in the sense that they allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations. This construction presents an issue of immense and enduring significance to states seeking to achieve and demonstrate compliance with Chapter 154. The court's decision finds no support in the language of Chapter 154, in its legislative history, or in analogous provisions of federal law; it also deviates in critical respects from the reasoning reflected in the only other extant circuit authority to analyze Chapter 154's terms. The Ninth Circuit's far-reaching misreading not only frustrates California's previous compliance efforts, but threatens to undermine the efforts of most other states that also "already ha[ve] done [their] part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh v. Murphy*, 521 U.S. at 331.[7] The decision thus affects a large number of pending and future proceedings (a minimum of about 300 in California alone (see note 1, *supra*)), and does so in a

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7. See Pet. App. 95a-172a (compilation of standards governing the appointment of capital collateral counsel in federal courts and 20 states).

way that gravely undermines Congress's twin objectives of expediting federal habeas review of capital cases and promoting reform of state collateral procedures. Indeed, the decision will most likely have the regrettable consequence of encouraging many states to *reduce* the level of procedural benefits they currently extend to death-sentenced prisoners on state collateral review, and will assuredly diminish any incentive the remaining states might have had to make improvements in that same regard. Accordingly, this Court's review is warranted.

The Ninth Circuit's analysis of California's compliance with Chapter 154 also suffers from numerous misapprehensions of state law. The substance of those errors, of course, does not merit this Court's review at this juncture. Rather, it is the circumstances that *led* to those errors—the Ninth Circuit's failure to invite the aid of the California Supreme Court—that raise profound concerns of federalism and comity. As grave as those concerns are, however, they can effectively be addressed in the current context with minimal supervisory intervention by this Court: On remand, the Ninth Circuit need only be reminded that, because it "lack[s] competence to rule definitively on the meaning of state [law]," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997), it should avail itself of the state's certification process to secure an authoritative construction of all provisions of state law relevant to the determination of California's compliance with Chapter 154. See *id.* at 77-80.

1. Chapter 154 nowhere states that complying standards of counsel competency must be "binding and mandatory." The Ninth Circuit's conclusion that Congress imposed this additional condition "implicitly" does not withstand analysis.

a. To be sure, Congress did prescribe *how* states must "provide" qualifying standards: by "rule of court or statute." But few rules and statutes in American law are without any exceptions, and many if not most *require* that discretion be exercised in their application. Tellingly, the Ninth Circuit did not identify a single rule of any court that would meet its conception of "binding and mandatory," and none comes readily to mind. Compare generally, *e.g.*, Fed. R. App. P. 2 (authorizing suspension of rules, on a case-by-case basis, "to expedite [the court of appeals'] decision or for other good

cause") with Pet. App. 18a ("'A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely disregard when appointing counsel'") (quoting *Ashmus v. Calderon*, 123 F.3d at 1208); compare Tax Court Rule 200(c) ("An applicant for admission by examination must be sponsored by at least two persons theretofore admitted to practice before this Court * * *. The Court may in its discretion accept such an applicant with less than two such sponsors") with Pet. App. 17a ("The requirement of competent counsel * * * would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator").[8/] Indeed, not only will resort to ordinary rulemaking and legislative processes rarely be sufficient to create the "binding and mandatory" features the Ninth Circuit would demand of the states, those devices are not necessary, or even the most effective means, to that end (as the Ninth Circuit eventually came to recognize). Pet. App. 13a-14a (acknowledging that the California Supreme Court's IOPPs, which the Ninth Circuit is certain are *not* rules of that court, nonetheless *require* appointment of capital collateral counsel); *id.* at 14a-15a (concluding that California decisional law, though also "binding on [its] face," is "not enough" to effect compliance with Chapter 154's requirements). Thus, the requirement that standards be provided by "rule of [state] court of last resort or

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8. Compare also, *e.g.*, 18 U.S.C. § 3501(b) (listing circumstances that must be "take[n] into consideration"—but no one of which must be deemed "conclusive"—when determining whether a confession was made voluntarily) with Pet. App. 20a (observing that Cal. R. Ct. 76.5 "is a rule of court, but it says only that the court shall 'consider' the section 20 guidelines, and the guidelines themselves require nothing"); compare *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) ("The basic rule against hearsay, of course, is riddled with exceptions") and *Regents of the Univ. of Calif. v. Public Employment Relations Bd.*, 485 U.S. 589 (1988) (noting that there are "numerous exceptions to the Private Express Statutes" (18 U.S.C. §§ 1693-1699, 39 U.S.C. §§ 601-606)) with Pet. App. 20a ("under California's unitary review scheme the section 20 guidelines need not be applied in any form if the court contracts with an 'administrator' to supervise the appointed counsel * * *, and the State points to no standards of competency for such an administrator").

statute" (which will turn strictly on state-law definitions) in no manner "implies" that those standards must be "binding and mandatory" in the peculiar sense suggested by the Ninth Circuit. Compare *id.* at 18a-19a (conflating these two "requirements") with *id.* at 10a n.6 (insisting that the Section 20 standards' status as rules under state law is not determinative).[9]

b. Nor is the Ninth Circuit's reading supported by Chapter 154's legislative history, which demonstrates the unremarkable proposition, itself explicit in the statute, that a complying state "must" *provide* standards, but says nothing that even remotely suggests Congress sought to dictate how states must *apply* their standards. Pet. App. 17a ("'[To qualify] a State would have to establish a system for the appointment and compensation of competent counsel throughout all stages of postconviction review'" (quoting Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Powell Committee Report (1989), 135 Cong. Rec. at S13483)); see also Pet. App. 18a n.13 ("'Central to the efficacy of [the

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9. No state, it must be observed, has yet been adjudged to have a qualifying mechanism. But the only other extant circuit decision to interpret Chapter 154's requirements is *not* supportive of the Ninth Circuit's peculiar understanding. See *Mata v. Johnson*, 99 F.3d 1261, 1266-1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (1997). Although Texas law "delegates the task of developing competency standards to Texas's highest criminal court, * * * the Texas Court of Criminal Appeals ha[d] failed to fulfill its delegated task," and instead evaluated individual counsel applicants without benefit of *any "explicit* standards of competency"; accordingly, the Fifth Circuit had no difficulty concluding that Texas was "not yet eligible to take advantage of the provisions afforded opt-in states under the AEDPA." *Id.* at 1266-1267 (emphasis added). One can plausibly read Chapter 154, as the Fifth Circuit apparently did, to require "binding and mandatory" standards in the limited sense that those standards must be "explicit" and *have the force of law. Id.* at 1267 & n.13; see also Pet. App. 72a n.29, quoted *supra* at page10. But the only law under which state standards can have force, of course, is *state* law, and that is precisely the subject on which the Ninth Circuit, believing it *not* to be determinative, refused edification. Thus, contrasting the Fifth Circuit's decision in *Mata* with the Ninth Circuit's decision in this case only highlights the urgent need for clarification. Compare Pet. App. 18a n.14 (citing *Mata)*

Chapter 154] scheme is the development of standards governing the competency of counsel'" (quoting Powell Committee Report, 135 Cong. Rec. at S13483)); see also Section-by-section Analysis of the Comprehensive Violent Crime Control Act of 1991, 137 Cong. Rec. at S3220 ("At a minimum, * * * these states [must] focus on an[d] articulate standards * * *"), quoted at Pet. App. 178a. The Ninth Circuit's contrary "implication" rests on the following reasoning:

> The requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator. Moreover, in the absence of mandatory standards, federal courts would be unable to evaluate the adequacy of a state's appointment mechanism without examining the competency of individual counsel. This approach would necessitate a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid.

Pet. App. 17a. As noted, however, rules and statutes are not ordinarily "eviscerated" by exceptions, or through their judicious application, and it seems doubtful that Congress thought the only alternative to "case-by-case" federal judicial oversight of state collateral appointment processes was denying states the prerogative to administer their counsel competency standards with reasonable flexibility and prudence. On this score, far more telling than the Ninth Circuit's supposition about congressional intent is the legislative history itself, which reveals the following view:

> The latitude afforded to the states in defining specific standards of counsel competence is also desirable in a new procedure of this type, and would enable all the states to learn from experience *the most effective means of ensuring competent counsel through the exploration of different approaches.*

137 Cong. Rec. at S3220 (emphasis added). Without disputing that Congress contemplated the states would retain considerable

"latitude" to fashion qualifying standards, the Ninth Circuit discerned that Congress's concern for flexibility was limited to the *substance* of state standards; on the manner of their *application*, by contrast, Congress was unyielding. In reaching this understanding, however, the court explicitly omitted from its consideration the last 34 words of the passage quoted directly above. See Pet. App. 20a n.18.

c. States seeking to satisfy congressional expectations on the subject of counsel standards would probably think it instructive to examine how Congress itself prescribed standards to govern the appointment of capital collateral counsel in *federal* court. Although feeling no compulsion to replicate the federal regimen in every detail, a state could reasonably assume that adoption of some rough approximation of Congress's own model would surely suffice to demonstrate that it, too, "provide[s] standards." Under the terms of 21 U.S.C. § 848(q) (6), collateral counsel appointed to represent prisoners sentenced to death in federal court are required to "have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases." Pet. App. 95a. Pursuant to subdivision (q)(7) of section 848, however, "the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." *Id.* at 95a-96a. Thus, federal counsel standards are effectively no more "binding and mandatory" than those of California (as well as a good many other states (see pages 23-24, *infra*)), and the "implication" the Ninth Circuit would ascribe to Congress is altogether implausible.

d. Further insight on congressional expectations can be gleaned from the "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" recommended by the American Bar Association in February 1989. In the commentary section following specification of "experiential criteria" for appointment of counsel, it is explicitly

> acknowledge[d] that there are many attorneys who *do not possess the experiential criteria detailed in the Guideline, but who should receive appointments because they will provide competent representation at trial, appeal and/or postconviction*. Such attorneys may have criminal law experience which does not meet the experiential criteria, may have attended training in death penalty defense representation or may have substantial experience in civil practice. *These attorneys should receive appointments if the appointing authority is satisfied the defendant or inmate will be provided with the same quality of representation as clients represented by attorneys who met the experiential criteria.* Attorneys who are appointed under the "Alternate Procedures" clauses of this Guideline [see, *e.g.*, Pet. App. 123a] obviously have an obligation to consult with other attorneys who are expert in death penalty defense, to attend specialized training and to do whatever else is necessary to allow them to provide competent representation to their clients.

Pet. App. 125a (emphasis added). The ABA's Guidelines themselves give effect to this assessment, allowing appointment under "Alternate Procedures" if "it is clearly demonstrated to the appointing authority that competent representation will be provided." *Id.* at 123a.

It is little wonder, then, that the majority of states adopting comprehensive mechanisms for the appointment of collateral counsel in capital cases have devised standards far more reflective of the "latitude" Congress sought to preserve than of the "binding and mandatory" construct the Ninth Circuit would seek to impose. Kansas, for example, has explicitly incorporated by reference the ABA's Guidelines, including the "Alternate Procedures." See Kan. Admin. Regs. 105-3-2; Pet. App. 116a. Idaho and Oregon have, in effect, done the same. Idaho Crim. R. 44.3(3)(b)(2) (effective September 15, 2000); Pet. App. 112a; Or. R. Appt. Counsel Std. 3.1(4); Pet. App. 157a. New York permits a "waiver" of its appointment standards, and even establishes a "review" procedure by which an attorney rejected by a screening panel can be added to the

appointment roster "if the Court deems the attorney qualified to serve as post-conviction counsel in a capital case." N.Y. Ct. Rules § 515.2(1)(b) & (3)(b); Pet. App. 142a, 143a. In Washington, the state supreme court has promulgated capital collateral counsel standards, yet expressly retains "final discretion in the appointment of counsel in personal restraint petitions in capital cases." Wa. R. App. P. 16.25; Pet. App. 172a. Arizona law is to a similar effect, Ariz. Rev. Stat. § 13-4041; Pet. App. 97a; Ariz. R. Crim. P. 6.8(d); Pet. App. 98a, as is the law of Mississippi, Miss. R. App. P. 22(c); Pet. App. 131a. Maryland requires the establishment of counsel lists and requires their "maximum use," but only "insofar as practical." Md. Code Ann., Art. 27A, § 6; Pet. App. 127a. Nevada requires counsel to satisfy minimum requirements, but permits "exceptions" if the appointing court is "satisfied that the attorney is competent and able to provide representation." Nev. Sup. Ct. R. 250; Pet. App. 139a-140a. Likewise, Ohio permits appointment of an attorney who "does not satisfy" specified requirements "if it can be demonstrated * * * that competent representation will be provided." Ohio Sup. R. 20, § II(C); Pet. App. 148a. Under specified circumstances, South Carolina, Arkansas, and California exempt from their general competency standards attorneys who have received previous collateral appointments from federal courts—which appointments, in turn, were subject to exemption from the criteria specified in § 848(q)(6) if, under § 848(q)(7), the federal court determined that adequate representation could be provided. S.C. Code Ann. § 17-27-160(B); S.C. R. Ct. 608(f); Pet. App. 158a, 160a; Ark. R. Crim. P. 37.5(c)(4); Pet. App. 100a; Cal. R. Ct. 76.6(k); Pet. App. 104-105a.[10/]

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10. When California divided appellate and collateral representational duties between different counsel in 1998, it also reconfigured its appointment standards. See generally Cal. Gov't Code § 68662. The qualification standards, the "alternative qualifications," and the narrow exceptions to both are now set forth in Cal. R. Ct. 76.6(e)-(f), (j) & (k). See Pet. App. 102a-105a. Significantly, at the time of new rule 76.6's adoption, it was announced that the new rule simply "sets forth *in greater detail* the standards *previously embodied in section 20(c) of the Standards of Judicial*

The foregoing states have made the eminently reasonable judgment that the flexible application of relatively stringent appointment standards affords a greater assurance of competent representation than would an unfailingly rigid application of less-demanding ones. None of these states "fails to provide standards." To the contrary, all have "develop[ed]," "focus[ed] on," and "articulate[d]" competency standards, 135 Cong. Rec. at S13483; 137 Cong. Rec. at S3220, and otherwise "done [their] part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh*, 521 U.S. at 321. Nevertheless, the Ninth Circuit's construction of Chapter 154 gravely jeopardizes any prospect that the "quid pro quo" envisioned by Congress, see Pet. App. 7a, will be honored in these jurisdictions.

States that feel constrained to redesign their capital review mechanisms to accommodate the Ninth Circuit's understanding of Chapter 154 will likely meet that challenge by *diluting* the content of their standards, sensing that the "binding and mandatory" requirement imposed on their application would prove unworkable otherwise. Alternatively, some states might well conclude that the terms of the "quid pro quo" (as defined by the Ninth Circuit) are entirely too costly, and abandon compliance efforts altogether. Certainly the Ninth Circuit's decision will do nothing to encourage additional reform in those states that have yet to decide whether to effect compliance, which may well be where state reform is most needed.

e. Despite the decidedly inhospitable reception Chapter 154 has endured in some lower courts, see, *e.g.*, *Wright v. Angelone*, 944 F. Supp. at 465-468 (decrying Virginia's mechanism as "a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations"), one could reasonably expect that, in time, a decision as wrong as the Ninth Circuit's will be explicitly rejected by other circuits. Nevertheless, pressing concerns of extraordinary practical and constitutional

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Administration." State C.A. Excerpt of Rec. 141 (Admin. Off. of Courts announcement of new rule 76.6) (Feb. 27, 1998) (emphases added).

importance call for the Court's review at this time.

Congress explicitly made Chapter 154 immediately applicable to pending cases, 110 Stat. 1226, reflecting the urgency of its resolve to break the nationwide logjam of capital cases that had amassed over the course of two decades. Questions relating to state compliance, however, are of no juridical moment until an affected state judgment reaches federal court on collateral review, and the delay separating this event from the actual effectuation of compliance at the state level is typically lengthy. Under these circumstances, deferring authoritative construction of Chapter 154 in favor of protracted percolation though district and circuit courts would unduly frustrate Congress's design for promoting procedural reform. In contrast, by reviewing the decision of the Ninth Circuit, this Court can supply states with the guidance necessary to achieve swift, certain, and widespread compliance with Chapter 154, thereby facilitating the expeditious resolution of collateral litigation in federal court, and further advancing Congress's ancillary goal of "*ensuring fairness and protecting the constitutional rights of capital litigants.*" Powell Committee Report, 135 Cong. Rec. S13482 (emphasis added), quoted at Pet. App. 51a. Protracted death penalty litigation is an unqualified evil: It undermines finality—a concern of "special importance in the context of a federal attack on a state conviction," *McCleskey v. Zant,* 499 U.S. 467, 491 (1990)—and raises troubling questions bearing on the *fairness with which condemned prisoners are treated*, see *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J.) (memorandum respecting denial of certiorari). Congress has prescribed a solution to this national crisis, but fair and consistent implementation will require this Court's authoritative guidance.

2. The Ninth Circuit's decision incorporates the following three conclusions of California law, all contrary to the understanding of the California Attorney General:

• The California Supreme Court's Death Penalty Policies and IOPPs are not "rules" of that court.[11/]

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11. The Ninth Circuit would not have needed to reach this question if

• Rule 76.5 and § 68511.5 do not "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases.[12]

• Notwithstanding the California Supreme Court's demonstrated "use" of the Section 20 standards, the court never adopted those standards, or, if it did adopt them, it did not do so pursuant to § 68070 or any other provision of state law that

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it had not first concluded that (1) a provision of law cannot "establish" a mechanism unless it "embodies" it and (2) state court rulemaking accomplished "by decision" is "not enough" to achieve compliance with Chapter 154. The court's construction ignores that Congress is demonstrably capable of demanding actual "inclusion" when that is its intent. See Pet. App. 81a ("a unitary review procedure must *include* an offer of counsel" (emphasis added)). Moreover, so long as a method of rulemaking is proper as a matter of state law, we doubt Congress sought to distinguish among available methods in the way suggested by the Ninth Circuit. Nevertheless, because it seems unlikely either question has any continuing national importance, petitioner does not seek review of the court's preliminary conclusions and therefore assumes for present purposes that those conclusions are correct.

12. The Ninth Circuit needed to reach this subject only because it concluded that the California Supreme Court had not adopted the Section 20 standards as "rules." In considering the "contemplations" of rule 76.5 and § 68511.5, the Ninth Circuit evidently overlooked § 68511.5's *first* sentence, which refers generally to "criminal appeals by indigent defendants," not merely to proceedings before the *intermediate* appellate courts. See *id.* at 83a. At any rate, rule 39.50 (another provision of state law that the Ninth Circuit did not cite or discuss) makes the rules governing non-capital appeals in the intermediate appellate courts generally applicable to capital appeals before the California Supreme Court—which would also explain the latter court's practice of distributing copies of rule 76.5 to applicants for *capital* case appointments. State C.A. Excerpt of Rec. 138-139. See also Section 20 (adopted in conjunction with rule 76.5 and containing, in subdivision (c), competency standards specific to capital appeals before the California Supreme Court); Pet. App. 87a. Finally, the Ninth Circuit appears to have momentarily overlooked the fact that because appellate counsel and collateral counsel were generally one and the same throughout the period 1989-1998, any provision applicable to the former's appointment was, by state-law definition and "contemplation," applicable to the latter's as well. In all events, we believe this matter will be mooted by correction of the Ninth Circuit's third conclusion of state law.

would permit their adoption as "rules."[13/]

The Ninth Circuit advanced two reasons for refusing to certify any disputed state-law questions to the California Supreme Court: (1) the state-law issues in dispute were not "novel," as the views urged by the state Attorney General were contrary to the circuit court's own understanding of state law, and (2) none of the state-law issues on which the Ninth Circuit issued pronouncements was "determinative." Clearly, "the certification requests merited more respectful consideration than they received in the proceedings below." *Arizonans*, 520 U.S. at 78.

First of all, the Ninth Circuit's state-law conclusions will appear to lack "novelty" only if one ignores authoritative state-law sources with which that court's understanding is woefully inconsistent. Compare, *e.g.*, *Sanders*, 21 Cal. 4th at 704, 706-711, 713, 716-721, 723 (referring to the Death Penalty Policies as rules at least 14 times) with Pet. App.13a (insisting that the Policies are not rules as a matter of state law). At any rate, "federal courts should hesitate to conclude that '[a State's] Executive Branch does not understand state law.'" *Huggins v. Isenbarger*, 798 F.2d 203, 207-210 (7th Cir. 1986) (Easterbrook, J., concurring), quoted in *Arizonans*, 520 U.S. at 76 n.30. The Ninth Circuit having been *twice* earlier led astray by *respondent's* misdescriptions of California law, see 123 F.3d at 1208 (insisting that state investigative funding is limited by a "four corners rule"); Pet. App. 33a (insisting that the state's collateral appointment mechanism was established "only" in the Policies and IOPP Rule XIII), that court's reluctance to accept the Attorney General's understanding, or at least to heed his request for certification, is all the more puzzling.

Moreover, that a state-law question "*may* be determina-

---

13. The court reached this question only because it preliminarily concluded not only that a provision of law must "embody" a mechanism in order to "establish" it, but that a rule or statute cannot "provide" standards unless it "contains" them. The error of such a construction has been noted. Nevertheless, we again assume for present purposes that the Ninth Circuit's strained constructions of both "establish" and "provide" are correct.

tive" (see note 4, *supra*) is reason enough to certify it, for what a court actually treats as determinative is often conditional (see notes 11-13, *supra*), and "[t]aking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court." *Arizonans,* 520 U.S. at 79; see also *Fiore v. White,* 120 S. Ct. 469, 473 (1999) (certifying question when answer "will help determine the proper state-law predicate" to federal question). Here, of course, the Ninth Circuit's assessment that none of its proclamations of state law was determinative rests entirely on the belief that Chapter 154 "implicitly" forecloses qualifying states from prescribing any exceptions to their counsel standards or allowing the state's judiciary to inform the administration of those standards with discretionary considerations. This error of federal statutory construction provided no warrant for making mis-pronouncements of state law as well.

"'Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when * * * the state courts stand willing to address questions of state law on certification from a federal court.'" *Arizonans,* 520 U.S. at 79 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). Here, despite being made aware that important questions relating to the California Supreme Court's rulemaking authority had been raised before that court by another death-sentenced prisoner, see Pet. for Reh'g 6 n.4 (citing *In re Mayfield,* Cal. Sup. Ct. No. S08100), the Ninth Circuit discerned "no cause for federal-court hesitation." *Arizonans*, 520 U.S. at 80. Under this Court's precedents, "A more cautious approach was in order." *Arizonans,* 520 U.S. at 77. Granting the state's certification motions would have "save[d] 'time, energy, and resources and help[ed] build a cooperative judicial federalism.'" *Id.* at 77. These interests can still be served through certification on remand.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2000

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Supreme Court, U.S.
FILED

No. 991720

APR 25 2000

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-99007

D.C. No. CV-93-00594-TEH
(Northern District of California)

TROY A. ASHMUS, *Petitioner-Appellee,*

v.

JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin, *Respondent-Appellant.*

[Argued and Submitted November 2, 1999
Filed January 24, 2000
Amended March 9, 2000]

ORDER AND AMENDED OPINION

Before: William C. Canby, Jr., David R. Thompson, and Susan P. Graber, Circuit Judges.

ORDER

The opinion previously filed in this case on January 24,

2000, slip op. at 661, is amended as follows:

1. At slip op. at 675:

Delete the passage beginning at line 5 (beginning "In contrast to . . .") to the end of the paragraph (ending ". . . 28 U.S.C. S 2265"). Substitute therefor the following passage:

> In contrast to these latter authorities that are binding on their face, the IOPPs merely recite that they are "observed by the California Supreme Court in the performance of its duties." *Id.* at 133.
>
> This distinction reinforces our conclusion that the IOPPS are not "rule[s] of court " as that term is used in Chapter 154. The State, however, points to the decision of the Supreme Court of California in *In re Sanders*, 21 Cal. 4th 697, 981 P.2d 1038 (1999), decided after briefing in this appeal. There the California Supreme Court said that appointment of counsel in capital state collateral proceedings "has long been this court's practice," *id.* at 717, 981 P.2d at 1051. It was first announced "as a matter of policy" in *In re Anderson*, 69 Cal. 2d 613, 633, 447 P.2d 117, 131 (1968). The *Sanders* opinion states that the California Court's "practice is currently memorialized in three places" in the IOPPs. *Sanders*, 21 Cal. 4th at 717, 981 P.2d at 1051. Finally, *Sanders* states that *Anderson*, the IOPPs, and the 1998 statute "all require" appointment of capital collateral counsel. *Id.* at 719, 981 P.2d at 1052.
>
> Although these statements are of course conclusive as matters of state law, we do not view them as changing the nature of the IOPPs or the Court's policies into "rules of court" within the meaning of Chapter 154. We have no doubt that

California's "practice" or "policy" has been to appoint collateral counsel in capital cases for many years, or that this practice or policy is "memorialized" in IOPPs or written Policies. *Sanders* now makes it clear that this practice or policy is a requirement of state law. But Chapter 154 requires that the particular mechanism for appointment of collateral counsel must be "establish[ed] by rule of its court of last resort or by statute." 28 U.S.C. § 2265(a).[10/] Establishment by decision is not enough. The IOPPs and policies do not purport to be rules of court for the reasons that we have stated. A decision by the California Supreme Court to accord mandatory effect to a policy or practice establishes a requirement by decision and not by the terms of a "rule of its court."

2. At slip op. at 677:

Delete the first full paragraph (beginning "Nor does it aid . . .") and ending (". . . federal statutory requirement").

3. At slip op. at 674:

In the first paragraph, second sentence (beginning "From 1989 to 1998 . . ."), at line 5 of the paragraph, delete the word "only."

---

10. Until April 29, 1997, and despite multiple revisions, the IOPPs provided for the authorization and appointment of collateral counsel only "after the termination of the party's state appeal." Cal. Court Rules, Vol. 23, pt. 3, at 141 (XIV.A.4) (West 1996). This phrasing stands in contradiction to the State's adoption of a unitary review scheme in 1989 and underscores the State's failure to provide a "clear mechanism that can be seen and relied upon by indigent capital defendants." *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996).

With these amendments, the panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Canby and Thompson have so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

CANBY, Circuit Judge:

Troy A. Ashmus, a prisoner sentenced to death by the California state courts, filed a federal petition for habeas corpus on May 15, 1998. During Ashmus' habeas proceeding, the Troy A. Ashmus, a prisoner sentenced to death by the California state courts, filed a federal petition for habeas corpus on May 15, 1998. During Ashmus' habeas proceeding, the State sought to avail itself of the procedural advantages of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[1/]

Ashmus contested the State's claim, and the district court issued a preliminary injunction enjoining the State from asserting Chapter 154 with respect to his petition. *See Ashmus v. Calderon*, 31 F.Supp.2d 1175 (N.D. Cal.1998) (order) (*Ashmus II*); *see also Ashmus v. Calderon*, 935 F.Supp. 1048

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1. Pub.L. No. 104-132, §§ 101-107, 110 Stat 1214, 1217-26 (Apr. 24, 1996), amending 28 U.S.C. §§ 2244 & 2253-2255 (modifying existing Chapter 153) and further codified at 28 U.S.C. §§ 2261-2266 (adding Chapter 154).

(N.D.Cal.1996) (*Ashmus I*), *aff'd*, 123 F.3d 1199 (9th Cir.1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998).[2/] The State brings a certified interlocutory appeal challenging the district court's order. We affirm.

I. BACKGROUND

Before addressing the merits of the State's claim, we review the procedural history of Ashmus' direct and collateral review, the statutory provisions of Chapter 154, the "quid pro quo" arrangement reflected in the legislative history to Chapter 154, and the unitary scheme of collateral review adopted by the State of California in 1989.

A. *Ashmus' direct and collateral review*

In 1986, Troy A. Ashmus was convicted of murder in California state court and sentenced to death. The State appointed appellate counsel for Ashmus on March 4, 1987. The State of California did not adopt its unitary review scheme in any form until 1989; consequently, when Ashmus received counsel, his attorneys did not have the authority to, nor was it contemplated that they would, develop any collateral claims.

On June 6, 1989, the California Supreme Court promulgated policies providing that "[a]ppellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." Supreme Court Policies Regarding Cases Arising from Judgments of Death, Cal. Court Rules, Vol. 23, pt. 3, at 143 (1-1) (West 1996) (1989 Supreme Court Policies). Although

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2. Ashmus first challenged the State's eligibility under Chapter 154 in a class action brought on behalf of a class of capital defendants. The district court enjoined the State from invoking Chapter 154 in any federal or state proceeding with respect to a member of the class. This court affirmed on the merits, but the Supreme Court reversed for lack of a case or controversy. *See Calderon v. Ashmus*, 523 U.S. 740 (1998).

Ashmus' state-appointed counsel may have been aware of this change in their obligations, they never received orders to investigate collateral claims.

The California Supreme Court affirmed Ashmus' death sentence on December 5, 1991. Ashmus initiated his federal habeas proceedings on February 17, 1993. *See Ashmus II*, 31 F.Supp.2d at 1177.

B. *Chapter 154*

California's eligibility to invoke Chapter 154 with respect to Ashmus' habeas petition turns on an interpretation of section 2265(a) of title 28.[3/] That section provides:

> This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State *establishes by rule of its court of last resort or by statute* a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The *rule of court or statute must provide standards of competency* for the appointment of such counsel.

---

3. A state with a qualifying unitary review procedure can opt-in to Chapter 154 under 28 U.S.C. § 2265; a state with a qualifying post-conviction procedure can opt-in under 28 U.S.C. § 2261. In a unitary review procedure, a petitioner is permitted "to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack." § 2265(a). In a post-conviction procedure, a petitioner can raise collateral claims after the conviction and sentence have been "upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes." § 2261(b).

28 U.S.C. § 2265(a) (emphases added).[4]

C. *The quid pro quo*

In return for meeting the statutory requirements of Chapter 154, a state is entitled to the following procedural advantages with respect to a federal habeas petition filed by one of its capital-sentenced prisoners: (1) the petition must be filed within 180 days of the termination of state court proceedings, 28 U.S.C. § 2263(a);[5] (2) the district court must render a final determination on the petition within 180 days of filing, § 2266(b)(1)(A); and (3) the court of appeals must render a determination on any appeal of the district court's determination within 120 days of the last responsive brief, § 2266(c)(1)(A).

This trade-off of procedural advantages in return for the appointment of competent counsel at the state and federal level creates a "quid pro quo" relationship. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.1996); *see also Lindh v. Murphy*,

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4. Section 2261(c), which is expressly incorporated with respect to unitary review procedures by section 2265(c), provides in part:

> Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in [here, section 2265(a)] must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--
> (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer[.]

28 U.S.C. § 2261(c).

5. Running of this 180-day clock can be tolled only by (1) the pendency of a petition for certiorari to the United States Supreme Court for direct review of the capital conviction; (2) the pendency of petitioner's first state petition for collateral review; and (3) certain other circumstances permitting an additional 30 days. *See* § 2263(b).

521 U.S. 320, 326-27 (1997). The Powell Committee, whose proposal Chapter 154 essentially codifies, *see Ashmus I*, 935 F.Supp. at 1055-56, stated the quid pro quo in these terms:

> [T]he Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

135 Cong. Rec. S13471-04, S13481, S13482 (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report (1989)) (Powell Committee Report).

D. *California's Unitary Review Scheme*

The State of California adopted a unitary scheme of collateral review effective June 6, 1989. The scheme, which the State previously referred to as a " 'comprehensive scheme of interlocking, cross-implementive provisions,' " *quoting Ashmus I,* 935 F.Supp. at 1056, is comprised of the following provisions:

(1) California Government Code § 68511.5 (effective Jan. 1, 1984);

(2) California Rule of Court 76.5 (effective Jan. 1, 1985);

(3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective Jan. 1, 1985);

(4) Introductory Statement, California Court Rules (effective Jan. 1, 1992)

(5) California Penal Code § 1241 (enacted 1955);

(6) California Government Code § 68070 (effective as amended Oct. 3, 1977);

(7) California Supreme Court Statement of Policies Regarding Cases Arising from Judgment of Death (adopted and effective June 6, 1989);

(8) California Supreme Court Internal Operating Practices and Procedures, Sections XIII.A and XIV.A (adopted Summer 1985, revised December 1989 and in 1995);

(9) California Supreme Court Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants (revised Sept. 19, 1990, and Dec. 22, 1993); and

(10) California Supreme Court Guidelines for Fixed Fee Appointment, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings (effective Jan. 1, 1994).

In 1997, long after the completion of all of Ashmus' state proceedings, California revised the structure of its unitary review scheme. The state legislature adopted Chapter 2.1 (now Chapter 2.3) of title 8 of the California Government Code, *see* Cal. Gov't Code §§ 68660-68666 (West Supp.1999) (effective Jan. 1, 1998), to create the California Habeas Resource Center. Section 68662 required the California Supreme Court to "offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." § 68662. Section 68665 required the California Judicial Council and the California Supreme Court to "adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." § 68665. Accordingly, the Judicial Council and the California Supreme Court adopted

California Rule of Court 76.6 (effective February 27, 1998) to implement the new statutory provisions. *See* Cal. R. Ct. 76.6 (West Supp.1999).

II. DISCUSSION

This court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). We review the district court's conclusions of law de novo, see *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1318-19 (9th Cir.1997), and its factual findings under the "clearly erroneous" standard, *see Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.1994).[6]

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6. The State moves to certify two questions of law to the California Supreme Court pursuant to California Rule of Court 29.5. *See* Appellant's Mot. to Certify Questions of State Law to Cal. Sup.Ct. ("Motion"). We decline to do so.

The State seeks certification of (1) whether any or all of three state law measures have been adopted as "rules of court" pursuant to California state law: (a) section 20 of the Standards of Judicial Administration; (b) the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death; and (c) the Payment Guidelines for Appointed Counsel. The State also seeks certification of (2) whether the Payment Guidelines violated California Penal Code section 1241 (which requires payment of a "reasonable sum for compensation and necessary expenses"). Questions (1)(c) and (2) are no longer relevant to this appeal because we do not address the question whether California's unitary review scheme compensates collateral counsel for "reasonable litigation expenses."

Questions (1)(a) and (1)(b) are relevant to this proceeding only because they relate to the meaning of the provision "rule of its court of last resort" in §28 U.S.C. 2265(a). But the question before this court is whether California is entitled to "opt-in" to Chapter 154; this is manifestly a question of federal statutory interpretation. The state court is in no better position than this court to interpret a federal statute--to the contrary. See *Micomonaco v. State of Wash.*, 45 F.3d 316, 322 (9th Cir.1995). Moreover, resolution of the question posed by the State would not, in any event, "be determinative of a cause pending in the certifying court." Cal. R. Ct. 29.5(a)(2). We therefore decline to exercise our discretion to certify. *See Micomonaco*, 45 F.3d at 322.

California can invoke the advantages of Chapter 154 with respect to Ashmus' habeas petition only if it affirmatively establishes that it has satisfied each condition in the federal statute. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997); *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996).

Chapter 154 applies to pending habeas petitions. *See* AEDPA, § 107(c), 110 Stat. 1214, 1226. California can opt-in to Chapter 154's expedited procedures, however, only if its mechanism for the appointment, compensation and payment of reasonable litigation expenses of collateral counsel is "established." *See* § 2265(a) ("establishes"). The question then becomes the relevant date: when must California have "established" its mechanism for the appointment of counsel in order to opt-in to Chapter 154 for the purpose of applying those expedited procedures to Ashmus' federal habeas petition?

The State contends that the relevant date is June 6, 1989, the effective date of the 1989 Supreme Court Policies and thus the date when Ashmus became entitled to the appointment of collateral counsel under California's unitary review scheme. Ashmus contends that the relevant date is March 4, 1987, the date on which direct appeal counsel was appointed for him and thus the date on which he would have been entitled to the appointment of collateral counsel had California's unitary review scheme been in place at that time. The district court concluded that the relevant date was 1987, when Ashmus would have been entitled to collateral counsel. *See Ashmus II*,

---

The State relies on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997), for the proposition that the panel should not "indulge [t]he district court's assumptions" about California state law without first certifying to the California Supreme Court. That case is inapposite. It involved the application of a state, not a federal, provision. *See id.* at 76-77. Moreover, it stated that there must be "[n]ovel, unsettled questions of state law" before certification is permitted. *Id.* at 79. Neither of the questions posed by the State is novel, and therefore certification is not appropriate.

31 F.Supp.2d at 1182. We need not decide which date is correct, because the text of 28 U.S.C. § 2265 plainly precludes California's opting-in in either case.

Prior to June 6, 1989, California had no scheme for the appointment of collateral counsel that could justify opting-in to Chapter 154. *See Ainsworth v. Calderon*, 138 F.3d 787, 790, *amended by* 152 F.3d 1223 (9th Cir.1998); *McDowell v. Calderon*, 107 F.3d 1351, 1355 n. 1, *amended by* 116 F.3d 364, *vacated in part on other grounds on reh'g en banc*, 130 F.3d 833 (9th Cir.1997), *cert. denied*, 118 S.Ct. 1575 (1998). The State does not contest this point.

In addition, from June 6, 1989, until at least January 1, 1998 (the effective date of California's appointment statute), California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 of the AEDPA.[7/] During that period, as we will explain below, California (1) failed to establish its appointment mechanism "by rule of its court of last resort or by statute" as required by 28 U.S.C. § 2265(a); and (2) failed to adopt a "rule of court or statute [to] provide standards of competency for the appointment of such counsel" as also required by 28 U.S.C. § 2265(a). Thus, whether the relevant date is 1987, as claimed by Ashmus, or 1989, as urged by the State, California has not met the statutory burden set out in Chapter 154, and cannot now avail itself of the procedural advantages which that Chapter affords.[8/]

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7. We do not address whether the 1998 amendments to California's unitary review scheme would render California eligible to opt-in to Chapter 154. As the district court correctly observed, this question is irrelevant to Ashmus' petition. *See Ashmus II*, 31 F.Supp.2d at 1184 n. 13.

8. The district court also held that the State was ineligible to opt-in to Chapter 154 because (1) the State did not provide for the timely appointment of counsel "upon" certain statutory findings as required by 28 U.S.C. § 2261(c)(1), *see Ashmus* II, 31 F. Supp. 2d at 1186-87; and (2) the State did not provide for compensation of collateral counsel's "reasonable litigation expenses" as required by 28 U.S.C. § 2265(a), *see Ashmus II*, 31

A. *Absence of statute or rule of court establishing mechanism for appointment of collateral counsel*

To be eligible under Chapter 154, California's mechanism for the appointment of collateral counsel must be "establishe[d] by rule of its court of last resort or by statute." §28 U.S.C. 2265(a). From 1989 to 1998, however, California's appointment mechanism was established in its 1989 Supreme Court Policies and Rule XIII (subsequently Rule XIV) of the Internal Operating Practices and Procedures (IOPPs) of the Supreme Court of California. *See* Cal. Court Rules, Vol. 23, pt. 3, at 141, 143-46. Neither of these authorities is a rule of court or statute. The 1989 Supreme Court Policies, as the name suggests, are policies--not rules of court or statutes.[9/] So, too,

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F. Supp. 2d at 1188-90. We decline to address these questions here. Our conclusion that the State's attempt to opt-in suffers from two fatal deficiencies discussed below makes it unnecessary to rule on these additional issues.

9. We reject the State's invitation to read isolated references in the legislative history of the AEDPA as trumping the unambiguous meaning of the statute. See 137 Cong. Rec. S3191-02, S3214, S3221 (Comprehensive Violent Crime Control Act of 1991 Section-by-Section Analysis (1991)) (1991 Analysis) ("California, for example, has adopted a unitary review procedure for capital cases by rule of its supreme court."). Context reveals that Congress' point was that unitary review, as opposed to post-conviction review, was a legitimate collateral procedure, even though the Powell Commission had not addressed unitary review in its report. *See id.* In any event, the plain meaning of the statute and California's rules, policies, procedures, and policies control. *See* IOPPs, Cal. Court Rules, Vol. 23, pt. 3, at 133 & n.2; *see also Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Nor is the State aided by a comment from the State's attorney general that "[b]y rule of court, death row prisoners who file federal habeas corpus petitions in California are entitled to the appointment of counsel upon request." 137 Cong. Rec. S8716-01, S8717 (1991). The attorney general's assertion says little about the intent of Congress in drafting Chapter 154, and even less about whether California has established a qualifying mechanism within the unambiguous meaning of the federal statute.

with the IOPPs. Although the IOPPs are contained in a bound volume labeled "Court Rules," the Introduction to the IOPP draws a distinction between the IOPPs and "provisions of the California Constitution, Codes and Rules of Court, as well as numerous provisions of the decisional law." Cal. Court Rules, Vol. 23, pt. 3, at 133 & n.2. In contrast to these latter authorities that are binding on their face, the IOPPs merely recite that they are "observed by the California Supreme Court in the performance of its duties." *Id.* at 133.

This distinction reinforces our conclusion that the IOPPS are not "rule[s] of court " as that term is used in Chapter 154. The State, however, points to the decision of the Supreme Court of California in *In re Sanders*, 21 Cal. 4th 697, 981 P.2d 1038 (1999), decided after briefing in this appeal. There the California Supreme Court said that appointment of counsel in capital state collateral proceedings "has long been this court's practice," *id.* at 717, 981 P.2d at 1051. It was first announced "as a matter of policy" in *In re Anderson*, 69 Cal. 2d 613, 633, 447 P.2d 117, 131 (1968). The *Sanders* opinion states that the California Court's "practice is currently memorialized in three places" in the IOPPs. *Sanders*, 21 Cal. 4th at 717, 981 P.2d at 1051. Finally, *Sanders* states that *Anderson*, the IOPPs, and the 1998 statute "all require" appointment of capital collateral counsel. *Id.* at 719, 981 P.2d at 1052.

Although these statements are of course conclusive as matters of state law, we do not view them as changing the nature of the IOPPs or the Court's policies into "rules of court" within the meaning of Chapter 154. We have no doubt that California's "practice" or "policy" has been to appoint collateral counsel in capital cases for many years, or that this practice or policy is "memorialized" in IOPPs or written Policies. *Sanders* now makes it clear that this practice or policy is a requirement of state law. But Chapter 154 requires

that the particular mechanism for appointment of collateral counsel must be "establish[ed] by rule of its court of last resort or by statute." 28 U.S.C. § 2265(a).[10] Establishment by decision is not enough. The IOPPs and policies do not purport to be rules of court for the reasons that we have stated. A decision by the California Supreme Court to accord mandatory effect to a policy or practice establishes a requirement by decision and not by the terms of a "rule of its court."

The State raises several objections to this conclusion, each of which we reject. The State contends that 28 U.S.C. § 2265(a) does not actually require the appointment mechanism to be embodied in a rule of court or statute, as long as the mechanism is "accomplished" by rule of court or statute. This claim has no support in the text. The statute is unambiguous: the State may opt-in to Chapter 154 only "if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment" of collateral counsel. § 2265(a). We discern no basis or authority for the novel interpretation urged by the State, and the State itself provides none.[11]

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10. Until April 29, 1997, and despite multiple revisions, the IOPPs provided for the authorization and appointment of collateral counsel only "after the termination of the party's state appeal." Cal. Court Rules, Vol. 23, pt. 3, at 141 (XIV.A.4) (West 1996). This phrasing stands in contradiction to the State's adoption of a unitary review scheme in 1989 and underscores the State's failure to provide a "clear mechanism that can be seen and relied upon by indigent capital defendants." *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996).

11. We reject the suggestion by amicus curiae to interpret the differing language in 28 U.S.C. § 2261(b) and 28 U.S.C. § 2265(a) as a mere "scrivener's error." Congress could well have intended that an appointment mechanism for post-conviction review be established by "statute, rule of its court of last resort, or by another agency authorized by State law," § 2261(b), while limiting the establishment of such a mechanism for unilateral review to "rule of its court of last resort or by statute," § 2265(a). In any event, the statute is unambiguous, and we have no need to search the legislative history for hidden meaning. *See Demarest*, 498 U.S. at 190.

The State also contends that Rule 76.5 and California Government Code § 68511.5 satisfy the federal statutory requirement. But neither Rule nor section 68511.5 actually establishes a qualifying appointment mechanism for collateral appeals. Section 68511.5 merely directs the Judicial Council to "adopt rules of court regulating the selection of appointed counsel." Cal. Gov't Code § 68511.5. Rule 76.5 requires each appellate court to "adopt procedures for appointment of counsel in criminal cases," but does not itself contain procedures for the appointment of counsel. *See* Cal. R. Ct. 76.5(a). Thus, even were we to overlook the fact that these two provisions contemplate the appointment of counsel on direct, and not collateral, appeal,[12/] no interpretation of these provisions could support a conclusion that they "establish" a mechanism for the appointment, compensation and payment of collateral counsel.

The State of California has offered no evidence that, as of June 1989, it had established "by rule of its court of last resort or by statute" a mechanism for the appointment, compensation and payment of reasonable expenses for collateral counsel. On this ground alone, California is ineligible to opt-in to Chapter 154 with respect to Ashmus' federal habeas petition.

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12. Both section 68511.5 and Rule 76.5 refer to "criminal appeals," not post-conviction proceedings. Moreover, section 68511.5 refers to the "appointment of counsel in all *appellate districts*," which is a clear reference to the intermediate state appellate courts, rather than the state supreme court. § 68511.5 (emphasis added); *see also* Cal. Const. art. VI, § 3 ("The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions.").

B. *Absence of statute or rule of court providing standards of competency for appointment of collateral counsel*

Chapter 154 requires that qualifying states must provide standards of competency in a rule of court. The statute and legislative history also require that such standards be mandatory and binding. California's unitary review scheme satisfies neither requirement.

The statute expressly states the first requirement: "The rule of court or statute must provide standards of competency for the appointment of such counsel." § 2265(a). The statute implicitly includes the second requirement: The competency standards must be binding and mandatory. *See id.* ("must provide standards"). As the district court correctly concluded, the legislative history demonstrates that Congress deemed the provision of competent counsel at all stages of collateral proceedings to be essential to the quid pro quo of Chapter 154. *See* Powell Committee Report, 135 Cong. Rec. at S13483 ("But to avail itself of [now Chapter 154's] more structured habeas corpus review procedures, a State would have to establish a system for the appointment and compensation of competent counsel throughout all stages of state post conviction review."); *see also Ashmus I*, 935 F. Supp. at 1073. The requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator. Moreover, in the absence of mandatory standards, federal courts would be unable to evaluate the adequacy of a state's appointment mechanism without examining the competency of individual counsel. This approach would necessitate a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid. *See* Powell Committee Report, 135 Cong.

Rec. at S13483; *see also Ashmus I*, 935 F. Supp. at 1073-74.[13] We conclude, as have other courts that have examined the issue,[14] that a state's competency standards must be mandatory and binding if the State is to avail itself of Chapter 154.

California's competency standards for collateral counsel are set out in section 20 of the Standards of Judicial Administration Recommended by the Judicial Council. *See* Cal. Court Rules, Vol. 23, pt. 2, at 636, 679-80, § 20 (West 1996).[15] Section 20 is not a rule of court or statute, however. It is neither mandatory nor binding. Section 20 uses hortatory language—"should." *See* § 20(a) ("Each appellate court ... should follow the guidelines in this section ...."); § 20(c) ("The Supreme Court should maintain a list of attorneys for appointment in death penalty cases....."). Section 20 is thus a

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13. Central to the efficacy of [the Chapter 154] scheme is the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation.... If prisoners under capital sentence in a particular State doubt that a State's mechanism for appointing counsel comports with [section 2261(b) or section 2265(a)], the adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation.

Powell Committee Report, 135 Cong. Rec. at S13483. Counsel must be required to meet competency standards if the adequacy of the system, as opposed to the competency of individual counsel, is to be evaluated by the courts. "A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely disregard when appointing counsel." *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir.1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998).

14. *See Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir.1996) (requiring "specific, mandatory standards for capital habeas counsel"), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir.1997); *Wright*, 944 F.Supp. at 467 (requiring "binding or mandatory standards of competency"); *see also Oken v. Nuth*, 30 F.Supp.2d 877, 880 n. 3 (D.Md.1998) (state must have and "apply" competency standards).

15. Section 20 is entitled "Guidelines for appointment of counsel in criminal appeals."

" 'recommendation[ ] to the courts' " made under the Judicial Council's authority to make recommendations under the state constitution; it is not a rule of court. Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1, at 4 (West 1996).[16] Also, as a recommendation to the Court, section 20 cannot be considered mandatory or binding. *See id.* ("The nonmandatory nature of the standards is indicated by the use of 'should' instead of the mandatory 'shall.' "). Section 20 is not, therefore, a qualifying competency standard within the meaning of 28 U.S.C. § 2265(a), and California is not eligible to opt-in to Chapter 154 with respect to Ashmus' petition. The State raises several objections, all of which are unavailing.[17] The State contends that section 20 is a rule of court because it is promulgated under California Government Code § 68070, which authorizes promulgation of local rules. But California has presented no evidence that section 20 was actually promulgated under that code section. Moreover, the State's argument is directly contradicted by the Introductory Statement to the California Court Rules, which explains that section 20 is not a rule of court at all.

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16. The Introduction distinguishes between rules of court and standards. *See* Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1, at 4 (West 1996) ("This Introductory Statement is intended to clarify the usual meaning and intent of rules, standards, and orders, and to distinguish among them."). Whereas rules of court are promulgated under the Judicial Council's constitutional authority to " 'adopt rules for court administration,' " standards are promulgated under the Judicial Council's constitutional authority to " 'make recommendations to the courts.' " *Id.* (quoting Cal. Const. art. VI, § 6). Standards use the nonmandatory "should" and, unlike rules of court, are considered nonbinding. *See id.* ("Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them as highly desirable standards of good practice.").

17. The district court ably and exhaustively discussed each of the State's contentions. *See Ashmus II*, 31 F. Supp. 2d at 1190-93 (also incorporating analysis from *Ashmus I*, 935 F. Supp. at 1072-74).

The State also urges that Rule 76.5 makes section 20 a rule of court and therefore mandatory. To be sure, Rule 76.5 is a rule of court, but it says only that the court shall "consider" the section 20 guidelines, and the guidelines themselves require nothing. *See* Cal. R. Ct. 76.5(b); *see also Wright*, 944 F.Supp. at 466 (concluding that "guidelines for establishing [competency] standards [that provide] ... no indication how many of the delineated criteria MUST be met" do not satisfy 28 U.S.C. § 2261(b)). Also, under California's unitary review scheme the section 20 guidelines need not be applied in any form if the court contracts with an "administrator" to supervise the appointed counsel, *see* section 20(d), and the State points to no standards of competency for such an administrator. Rule 76.5 does not aid the State.

The State also claims that section 20 has become binding (and a rule of court) because it has been adopted by the California Supreme Court. The State presents some evidence that the section 20 considerations have been used by the California Supreme Court as an "initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal." *Ashmus II*, 31 F. Supp. 2d at 1192 (internal quotation marks omitted). We agree, however, with the district court; the California Supreme Court's compliance in practice with a hortatory guideline does not meet the federal statutory command. *See id.*[18]

Finally, the State argues that a qualifying state's competency standards need not be contained in a rule of court or statute as long as they are provided for in one, and that California Government Code § 68511.5 and California Rule of

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18. The State suggests that the district court's requirement of mandatory competency standards is inconsistent with "[t]he latitude afforded to the states in defining specific standards of counsel competence." 1991 Analysis, 137 Cong. Rec. at S3220. Not so. We do not address here the "specific standards" adopted by the State of California; we address only whether those standards are mandatory or hortatory.

Court 76.5 so provide. We decline to read the statute ("The rule of court or statute must provide standards of competency") to encompass a rule of court or statute that merely authorizes the promulgation of competency standards in some other instrument. . Such an interpretation is contrary to the unambiguous meaning of the statute.[19/] But even if we were to adopt the construction urged by the State, it would not affect our analysis. Rule 76.5 and section 68511.5 do not require the promulgation of competency standards; at best, they merely permit them. *See* Cal. Gov't Code § 68511.5 (requiring only the adoption of "procedures for the appointment of counsel in all appellate districts"); Cal. R. Ct. 76.5(a) (requiring only the adoption of "procedures for the appointment of counsel in criminal cases"). Moreover, section 68511.5 contemplates the appointment of counsel on direct, not collateral, appeal. *See supra* note 12. Finally, the substantive competency guidelines actually promulgated by the State (and contained in section 20) are recommendations to the courts only, and cannot satisfy the statutory requirement that such standards be mandatory and binding.

We therefore reject the State's argument that the unitary review scheme that it adopted in June 1989 meets the Chapter 154 requirement that "[t]he rule of court or statute must provide standards of competency for the appointment of [collateral] counsel."

CONCLUSION

The State of California seeks to opt-in to the procedural advantages of Chapter 154 of the AEDPA with respect to Troy A. Ashmus' petition for federal habeas corpus. The State has not demonstrated, however, that it has complied with the

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19. The conclusions of other courts that have examined the issue contradict the State's view. *See Mata*, 99 F.3d at 1267; *Zuern v. Tate*, 938 F.Supp. 468, 471 (S.D. Ohio 1996).

unambiguous requirements of that statute. During all times relevant to this appeal, and at least until 1998, California failed to establish "by rule of its court of last resort or by statute" a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners. California also failed to provide mandatory and binding standards of competency for collateral counsel in a "rule of court or statute."

The order of the district court is

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-99007

D.C. No. CV-93-00594-TEH

TROY A. ASHMUS, Petitioner-Appellee,

v.

JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin, Respondent-Appellant.

[Filed: February 4, 2000]

ORDER

BEFORE: CANBY, THOMPSON and GRABER, Circuit Judges

Appellant's second motion to certify questions of state law to the California Supreme Court is DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-99007

D.C. No. CV-93-00594-TEH

TROY A. ASHMUS, *Petitioner-Appellee,*

v.

JEANNE WOODFORD, Acting Warden of California State Prison at San Quentin, *Respondent-Appellant.*

[Argued and Submitted November 2, 1999
Filed January 24, 2000]

Before: William C. Canby, Jr., David R. Thompson, and Susan P. Graber, Circuit Judges.

CANBY, Circuit Judge:

Troy A. Ashmus, a prisoner sentenced to death by the California state courts, filed a federal petition for habeas corpus on May 15, 1998. During Ashmus' habeas proceeding, the State sought to avail itself of the procedural advantages of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[1]

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1. Pub.L. No. 104-132, §§ 101-107, 110 Stat 1214, 1217-26 (Apr. 24, 1996), amending 28 U.S.C. §§ 2244 & 2253-2255 (modifying existing

Ashmus contested the State's claim, and the district court issued a preliminary injunction enjoining the State from asserting Chapter 154 with respect to his petition. *See Ashmus v. Calderon*, 31 F.Supp.2d 1175 (N.D. Cal.1998) (order) (*Ashmus II*); *see also Ashmus v. Calderon*, 935 F.Supp. 1048 (N.D.Cal.1996) (*Ashmus I*), *aff'd*, 123 F.3d 1199 (9th Cir.1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998).[2] The State brings a certified interlocutory appeal challenging the district court's order. We affirm.

I. BACKGROUND

Before addressing the merits of the State's claim, we review the procedural history of Ashmus' direct and collateral review, the statutory provisions of Chapter 154, the "quid pro quo" arrangement reflected in the legislative history to Chapter 154, and the unitary scheme of collateral review adopted by the State of California in 1989.

A. *Ashmus' direct and collateral review*

In 1986, Troy A. Ashmus was convicted of murder in California state court and sentenced to death. The State appointed appellate counsel for Ashmus on March 4, 1987. The State of California did not adopt its unitary review scheme in any form until 1989; consequently, when Ashmus received counsel, his attorneys did not have the authority to, nor was it contemplated that they would, develop any collateral claims.

Chapter 153) and further codified at 28 U.S.C. §§ 2261-2266 (adding Chapter 154).

2. Ashmus first challenged the State's eligibility under Chapter 154 in a class action brought on behalf of a class of capital defendants. The district court enjoined the State from invoking Chapter 154 in any federal or state proceeding with respect to a member of the class. This court affirmed on the merits, but the Supreme Court reversed for lack of a case or controversy. *See Calderon v. Ashmus*, 523 U.S. 740 (1998).

On June 6, 1989, the California Supreme Court promulgated policies providing that "[a]ppellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus." Supreme Court Policies Regarding Cases Arising from Judgments of Death, Cal. Court Rules, Vol. 23, pt. 3, at 143 (1-1) (West 1996) (1989 Supreme Court Policies). Although Ashmus' state-appointed counsel may have been aware of this change in their obligations, they never received orders to investigate collateral claims.

The California Supreme Court affirmed Ashmus' death sentence on December 5, 1991. Ashmus initiated his federal habeas proceedings on February 17, 1993. *See Ashmus II*, 31 F.Supp.2d at 1177.

B. *Chapter 154*

California's eligibility to invoke Chapter 154 with respect to Ashmus' habeas petition turns on an interpretation of section 2265(a) of title 28.[3] That section provides:

> This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State *establishes by rule of its court of last resort or by statute* a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including

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3. A state with a qualifying unitary review procedure can opt-in to Chapter 154 under 28 U.S.C. § 2265; a state with a qualifying post-conviction procedure can opt-in under 28 U.S.C. § 2261. In a unitary review procedure, a petitioner is permitted "to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack." § 2265(a). In a post-conviction procedure, a petitioner can raise collateral claims after the conviction and sentence have been "upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes." § 2261(b).

> expenses relating to the litigation of collateral claims in the proceedings. The *rule of court or statute must provide standards of competency* for the appointment of such counsel.

§28 U.S.C. 2265(a) (emphases added).[4/]

C. *The quid pro quo*

In return for meeting the statutory requirements of Chapter 154, a state is entitled to the following procedural advantages with respect to a federal habeas petition filed by one of its capital-sentenced prisoners: (1) the petition must be filed within 180 days of the termination of state court proceedings, 28 U.S.C. § 2263(a);[5/] (2) the district court must render a final determination on the petition within 180 days of filing, § 2266(b)(1)(A); and (3) the court of appeals must render a determination on any appeal of the district court's determination within 120 days of the last responsive brief, § 2266(c)(1)(A).

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4. Section 2261(c), which is expressly incorporated with respect to unitary review procedures by section 2265(c), provides in part:

> Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in [here, section 2265(a)] must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--
> (1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer[.]

28 U.S.C. § 2261(c).

5. Running of this 180-day clock can be tolled only by (1) the pendency of a petition for certiorari to the United States Supreme Court for direct review of the capital conviction; (2) the pendency of petitioner's first state petition for collateral review; and (3) certain other circumstances permitting an additional 30 days. *See* § 2263(b).

This trade-off of procedural advantages in return for the appointment of competent counsel at the state and federal level creates a "quid pro quo" relationship. *See Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.1996); *see also Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). The Powell Committee, whose proposal Chapter 154 essentially codifies, *see Ashmus I*, 935 F.Supp. at 1055-56, stated the quid pro quo in these terms:

> [T]he Committee believes that provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.

135 Cong. Rec. S13471-04, S13481, S13482 (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report (1989)) (Powell Committee Report).

D. *California's Unitary Review Scheme*

The State of California adopted a unitary scheme of collateral review effective June 6, 1989. The scheme, which the State previously referred to as a " 'comprehensive scheme of interlocking, cross-implementive provisions,' " *quoting Ashmus I*, 935 F.Supp. at 1056, is comprised of the following provisions:

(1) California Government Code § 68511.5 (effective Jan. 1, 1984);

(2) California Rule of Court 76.5 (effective Jan. 1, 1985);

(3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective Jan. 1, 1985);

(4) Introductory Statement, California Court Rules (effective Jan. 1, 1992)

(5) California Penal Code § 1241 (enacted 1955);

(6) California Government Code § 68070 (effective as amended Oct. 3, 1977);

(7) California Supreme Court Statement of Policies Regarding Cases Arising from Judgment of Death (adopted and effective June 6, 1989);

(8) California Supreme Court Internal Operating Practices and Procedures, Sections XIII.A and XIV.A (adopted Summer 1985, revised December 1989 and in 1995);

(9) California Supreme Court Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants (revised Sept. 19, 1990, and Dec. 22, 1993); and

(10) California Supreme Court Guidelines for Fixed Fee Appointment, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings (effective Jan. 1, 1994).

In 1997, long after the completion of all of Ashmus' state proceedings, California revised the structure of its unitary review scheme. The state legislature adopted Chapter 2.1 (now Chapter 2.3) of title 8 of the California Government Code, *see* Cal. Gov't Code §§ 68660-68666 (West Supp.1999) (effective Jan. 1, 1998), to create the California Habeas Resource Center. Section 68662 required the California Supreme Court to "offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." § 68662. Section 68665 required the California Judicial Council and the California Supreme Court to adopt,

by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." § 68665. Accordingly, the Judicial Council and the California Supreme Court adopted California Rule of Court 76.6 (effective February 27, 1998) to implement the new statutory provisions. *See* Cal. R. Ct. 76.6 (West Supp.1999).

II. DISCUSSION

This court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b). We review the district court's conclusions of law de novo, see *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1318-19 (9th Cir.1997), and its factual findings under the "clearly erroneous" standard, *see Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.1994).[6]

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6. The State moves to certify two questions of law to the California Supreme Court pursuant to California Rule of Court 29.5. *See* Appellant's Mot. to Certify Questions of State Law to Cal. Sup.Ct. ("Motion"). We decline to do so.

The State seeks certification of (1) whether any or all of three state law measures have been adopted as "rules of court" pursuant to California state law: (a) section 20 of the Standards of Judicial Administration; (b) the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death; and (c) the Payment Guidelines for Appointed Counsel. The State also seeks certification of (2) whether the Payment Guidelines violated California Penal Code section 1241 (which requires payment of a "reasonable sum for compensation and necessary expenses"). Questions (1)(c) and (2) are no longer relevant to this appeal because we do not address the question whether California's unitary review scheme compensates collateral counsel for "reasonable litigation expenses."

Questions (1)(a) and (1)(b) are relevant to this proceeding only because they relate to the meaning of the provision "rule of its court of last resort" in §28 U.S.C. 2265(a). But the question before this court is whether California is entitled to "opt-in" to Chapter 154; this is manifestly a question of federal statutory interpretation. The state court is in no better position than this court to interpret a federal statute--to the contrary. See *Micomonaco v. State of Wash.*, 45 F.3d 316, 322 (9th Cir.1995). Moreover,

California can invoke the advantages of Chapter 154 with respect to Ashmus' habeas petition only if it affirmatively establishes that it has satisfied each condition in the federal statute. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997); *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996).

Chapter 154 applies to pending habeas petitions. *See* AEDPA, § 107(c), 110 Stat. 1214, 1226. California can opt-in to Chapter 154's expedited procedures, however, only if its mechanism for the appointment, compensation and payment of reasonable litigation expenses of collateral counsel is "established." *See* § 2265(a) ("establishes"). The question then becomes the relevant date: when must California have "established" its mechanism for the appointment of counsel in order to opt-in to Chapter 154 for the purpose of applying those expedited procedures to Ashmus' federal habeas petition?

The State contends that the relevant date is June 6, 1989, the effective date of the 1989 Supreme Court Policies and thus the date when Ashmus became entitled to the appointment of collateral counsel under California's unitary review scheme. Ashmus contends that the relevant date is March 4, 1987, the date on which direct appeal counsel was appointed for him and thus the date on which he would have been entitled to the

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resolution of the question posed by the State would not, in any event, "be determinative of a cause pending in the certifying court." Cal. R. Ct. 29.5(a)(2). We therefore decline to exercise our discretion to certify. *See Micomonaco*, 45 F.3d at 322.

The State relies on *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997), for the proposition that the panel should not "indulge [t]he district court's assumptions" about California state law without first certifying to the California Supreme Court. That case is inapposite. It involved the application of a state, not a federal, provision. *See id.* at 76-77. Moreover, it stated that there must be "[n]ovel, unsettled questions of state law" before certification is permitted. *Id.* at 79. Neither of the questions posed by the State is novel, and therefore certification is not appropriate.

appointment of collateral counsel had California's unitary review scheme been in place at that time. The district court concluded that the relevant date was 1987, when Ashmus would have been entitled to collateral counsel. *See Ashmus II*, 31 F.Supp.2d at 1182. We need not decide which date is correct, because the text of 28 U.S.C. § 2265 plainly precludes California's opting-in in either case.

Prior to June 6, 1989, California had no scheme for the appointment of collateral counsel that could justify opting-in to Chapter 154. *See Ainsworth v. Calderon*, 138 F.3d 787, 790, *amended by* 152 F.3d 1223 (9th Cir.1998); *McDowell v. Calderon*, 107 F.3d 1351, 1355 n. 1, *amended by* 116 F.3d 364, *vacated in part on other grounds on reh'g en banc*, 130 F.3d 833 (9th Cir.1997), *cert. denied*, 118 S.Ct. 1575 (1998). The State does not contest this point.

In addition, from June 6, 1989, until at least January 1, 1998 (the effective date of California's appointment statute), California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 of the AEDPA.[7/] During that period, as we will explain below, California (1) failed to establish its appointment mechanism "by rule of its court of last resort or by statute" as required by 28 U.S.C. § 2265(a); and (2) failed to adopt a "rule of court or statute [to] provide standards of competency for the appointment of such counsel" as also required by 28 U.S.C. § 2265(a). Thus, whether the relevant date is 1987, as claimed by Ashmus, or 1989, as urged by the State, California has not met the statutory

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7. We do not address whether the 1998 amendments to California's unitary review scheme would render California eligible to opt-in to Chapter 154. As the district court correctly observed, this question is irrelevant to Ashmus' petition. *See Ashmus II*, 31 F.Supp.2d at 1184 n. 13.

burden set out in Chapter 154, and cannot now avail itself of the procedural advantages which that Chapter affords.[8/]

A. *Absence of statute or rule of court establishing mechanism for appointment of collateral counsel*

To be eligible under Chapter 154, California's mechanism for the appointment of collateral counsel must be "establishe[d] by rule of its court of last resort or by statute." §28 U.S.C. 2265(a). From 1989 to 1998, however, California's appointment mechanism was established only in its 1989 Supreme Court Policies and Rule XIII (subsequently Rule XIV) of the Internal Operating Practices and Procedures (IOPPs) of the Supreme Court of California. *See* Cal. Court Rules, Vol. 23, pt. 3, at 141, 143-46. Neither of these authorities is a rule of court or statute. The 1989 Supreme Court Policies, as the name suggests, are policies--not rules of court or statutes.[9/] So, too, with the IOPPs. Although the IOPPs

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8. The district court also held that the State was ineligible to opt-in to Chapter 154 because (1) the State did not provide for the timely appointment of counsel "upon" certain statutory findings as required by 28 U.S.C. § 2261(c)(1), *see Ashmus* II, 31 F. Supp. 2d at 1186-87; and (2) the State did not provide for compensation of collateral counsel's "reasonable litigation expenses" as required by 28 U.S.C. § 2265(a), *see Ashmus II*, 31 F. Supp. 2d at 1188-90. We decline to address these questions here. Our conclusion that the State's attempt to opt-in suffers from two fatal deficiencies discussed below makes it unnecessary to rule on these additional issues.

9. We reject the State's invitation to read isolated references in the legislative history of the AEDPA as trumping the unambiguous meaning of the statute. See 137 Cong. Rec. S3191-02, S3214, S3221 (Comprehensive Violent Crime Control Act of 1991 Section-by-Section Analysis (1991)) (1991 Analysis) ("California, for example, has adopted a unitary review procedure for capital cases by rule of its supreme court."). Context reveals that Congress' point was that unitary review, as opposed to post-conviction review, was a legitimate collateral procedure, even though the Powell Commission had not addressed unitary review in its report. *See id.* In any event, the plain meaning of the statute and California's rules, policies, procedures, and policies control. *See* IOPPs, Cal. Court Rules, Vol. 23, pt.

are contained in a bound volume labeled "Court Rules," the Introduction to the IOPP draws a distinction between the IOPPs and "provisions of the California Constitution, Codes and Rules of Court, as well as numerous provisions of the decisional law." Cal. Court Rules, Vol. 23, pt. 3, at 133 & n.2. In contrast to these latter mandatory and binding authorities, the IOPPs are merely "observed by the California Supreme Court in the performance of its duties." *Id.* at 133.[10] This admission that the IOPPs are not mandatory and binding only reinforces our conclusion that the IOPPs cannot constitute a "rule of court" as that term is used in Chapter 154. Section 2265(b) requires that a qualifying unitary review procedure "*must* include an offer of counsel." § 2265(b) (emphasis added). Section 2261(c), incorporated into section 2265(b), requires that "[a]ny mechanism for the appointment, compensation, and reimbursement of counsel ... *must* offer counsel to all State prisoners under capital sentence and *must* provide for the entry

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3, at 133 & n.2; *see also Demarest v. Manspeaker*, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Nor is the State aided by a comment from the State's attorney general that "[b]y rule of court, death row prisoners who file federal habeas corpus petitions in California are entitled to the appointment of counsel upon request." 137 Cong. Rec. S8716-01, S8717 (1991). The attorney general's assertion says little about the intent of Congress in drafting Chapter 154, and even less about whether California has established a qualifying mechanism within the unambiguous meaning of the federal statute.

10. Until April 29, 1997, and despite multiple revisions, the IOPPs provided for the authorization and appointment of counsel only "after the termination of the party's state appeal." Cal. Court Rules, Vol. 23, pt. 3, at 141 (XIV.A.4) (West 1996). This phrasing stands in contradiction to the State's adoption of a unitary review scheme in 1989 and underscores the State's failure to provide a "clear mechanism that can be seen and relied upon by indigent capital defendants, rather than a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations." *Wright v. Angelone*, 944 F.Supp. 460, 468 (E.D.Va.1996).

of an order by a court of record." § 2261(c) (emphases added). Chapter 154 thus requires a mandatory and binding appointment mechanism and, at all times relevant to Ashmus, California failed to provide one. *Cf. Scott v. Anderson*, 958 F.Supp. 330, 332 (N.D. Ohio 1997) (state system granting appointed attorney discretion whether to appeal capital case does not qualify under Chapter 154). Thus, both formally and functionally, the IOPPs are not rules of court within the meaning of 28 U.S.C. § 2265.

The State raises several objections to this conclusion, each of which we reject. The State contends that 28 U.S.C. § 2265(a) does not actually require the appointment mechanism to be embodied in a rule of court or statute, as long as the mechanism is "accomplished" by rule of court or statute. This claim has no support in the text. The statute is unambiguous: the State may opt-in to Chapter 154 only "if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment" of collateral counsel. § 2265(a). We discern no basis or authority for the novel interpretation urged by the State, and the State itself provides none.[11]

The State also contends that Rule 76.5 and California Government Code § 68511.5 satisfy the federal statutory requirement. But neither Rule nor section 68511.5 actually establishes a qualifying appointment mechanism for collateral appeals. Section 68511.5 merely directs the Judicial Council to

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11. We reject the suggestion by amicus curiae to interpret the differing language in 28 U.S.C. § 2261(b) and 28 U.S.C. § 2265(a) as a mere "scrivener's error." Congress could well have intended that an appointment mechanism for post-conviction review be established by "statute, rule of its court of last resort, or by another agency authorized by State law," § 2261(b), while limiting the establishment of such a mechanism for unilateral review to "rule of its court of last resort or by statute," § 2265(a). In any event, the statute is unambiguous, and we have no need to search the legislative history for hidden meaning. *See Demarest*, 498 U.S. at 190.

"adopt rules of court regulating the selection of appointed counsel." Cal. Gov't Code § 68511.5. Rule 76.5 requires each appellate court to "adopt procedures for appointment of counsel in criminal cases," but does not itself contain procedures for the appointment of counsel. *See* Cal. R. Ct. 76.5(a). Thus, even were we to overlook the fact that these two provisions contemplate the appointment of counsel on direct, and not collateral, appeal,[12/] no interpretation of these provisions could support a conclusion that they "establish" a mechanism for the appointment, compensation and payment of collateral counsel.

Nor does it aid the State to read Rule 76.5 and section 68511.5 in conjunction with the 1989 Supreme Court Policies and Rule XIII/XIV of the IOPPs. As we noted above, these latter authorities are not rules of court, nor are they binding. They cannot remedy the failure to satisfy the federal statutory requirement.

The State of California has offered no evidence that, as of June 1989, it had established "by rule of its court of last resort or by statute" a mechanism for the appointment, compensation and payment of reasonable expenses for collateral counsel. On this ground alone, California is ineligible to opt-in to Chapter 154 with respect to Ashmus' federal habeas petition.

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12. Both section 68511.5 and Rule 76.5 refer to "criminal appeals," not post-conviction proceedings. Moreover, section 68511.5 refers to the "appointment of counsel in all *appellate districts*," which is a clear reference to the intermediate state appellate courts, rather than the state supreme court. § 68511.5 (emphasis added); *see also* Cal. Const. art. VI, § 3 ("The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions.").

B. *Absence of statute or rule of court providing standards of competency for appointment of collateral counsel*

Chapter 154 requires that qualifying states must provide standards of competency in a rule of court. The statute and legislative history also require that such standards be mandatory and binding. California's unitary review scheme satisfies neither requirement.

The statute expressly states the first requirement: "The rule of court or statute must provide standards of competency for the appointment of such counsel." § 2265(a). The statute implicitly includes the second requirement: The competency standards must be binding and mandatory. *See id.* ("must provide standards"). As the district court correctly concluded, the legislative history demonstrates that Congress deemed the provision of competent counsel at all stages of collateral proceedings to be essential to the quid pro quo of Chapter 154. *See* Powell Committee Report, 135 Cong. Rec. at S13483 ("But to avail itself of [now Chapter 154's] more structured habeas corpus review procedures, a State would have to establish a system for the appointment and compensation of competent counsel throughout all stages of state post conviction review."); *see also Ashmus I*, 935 F. Supp. at 1073. The requirement of competent counsel at all stages of the proceedings would be eviscerated if the decision to follow the standards were left to the discretion of a court or guideline administrator. Moreover, in the absence of mandatory standards, federal courts would be unable to evaluate the adequacy of a state's appointment mechanism without examining the competency of individual counsel. This approach would necessitate a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154, a piecemeal consequence that Congress sought to avoid. *See* Powell Committee Report, 135 Cong.

Rec. at S13483; *see also Ashmus I*, 935 F. Supp. at 1073-74.[13] We conclude, as have other courts that have examined the issue,[14] that a state's competency standards must be mandatory and binding if the State is to avail itself of Chapter 154.

California's competency standards for collateral counsel are set out in section 20 of the Standards of Judicial Administration Recommended by the Judicial Council. *See* Cal. Court Rules, Vol. 23, pt. 2, at 636, 679-80, § 20 (West 1996).[15] Section 20 is not a rule of court or statute, however. It is neither mandatory nor binding. Section 20 uses hortatory language—"should." *See* § 20(a) ("Each appellate court ... should follow the guidelines in this section ...."); § 20(c) ("The Supreme Court should maintain a list of attorneys for appointment in death penalty cases...."). Section 20 is thus a

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13. Central to the efficacy of [the Chapter 154] scheme is the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation.... If prisoners under capital sentence in a particular State doubt that a State's mechanism for appointing counsel comports with [section 2261(b) or section 2265(a)], the adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation.

Powell Committee Report, 135 Cong. Rec. at S13483. Counsel must be required to meet competency standards if the adequacy of the system, as opposed to the competency of individual counsel, is to be evaluated by the courts. "A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely disregard when appointing counsel." *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir.1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998).

14. *See Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir.1996) (requiring "specific, mandatory standards for capital habeas counsel"), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir.1997); *Wright*, 944 F.Supp. at 467 (requiring "binding or mandatory standards of competency"); *see also Oken v. Nuth*, 30 F.Supp.2d 877, 880 n. 3 (D.Md.1998) (state must have and "apply" competency standards).

15. Section 20 is entitled "Guidelines for appointment of counsel in criminal appeals."

" 'recommendation[ ] to the courts' " made under the Judicial Council's authority to make recommendations under the state constitution; it is not a rule of court. Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1, at 4 (West 1996).[16] Also, as a recommendation to the Court, section 20 cannot be considered mandatory or binding. *See id.* ("The nonmandatory nature of the standards is indicated by the use of 'should' instead of the mandatory 'shall.' "). Section 20 is not, therefore, a qualifying competency standard within the meaning of 28 U.S.C. § 2265(a), and California is not eligible to opt-in to Chapter 154 with respect to Ashmus' petition. The State raises several objections, all of which are unavailing.[17] The State contends that section 20 is a rule of court because it is promulgated under California Government Code § 68070, which authorizes promulgation of local rules. But California has presented no evidence that section 20 was actually promulgated under that code section. Moreover, the State's argument is directly contradicted by the Introductory Statement to the California Court Rules, which explains that section 20 is not a rule of court at all.

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16. The Introduction distinguishes between rules of court and standards. *See* Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1, at 4 (West 1996) ("This Introductory Statement is intended to clarify the usual meaning and intent of rules, standards, and orders, and to distinguish among them."). Whereas rules of court are promulgated under the Judicial Council's constitutional authority to " 'adopt rules for court administration,' " standards are promulgated under the Judicial Council's constitutional authority to " 'make recommendations to the courts.' " *Id.* (quoting Cal. Const. art. VI, § 6). Standards use the nonmandatory "should" and, unlike rules of court, are considered nonbinding. *See id.* ("Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them as highly desirable standards of good practice.").

17. The district court ably and exhaustively discussed each of the State's contentions. *See Ashmus II*, 31 F. Supp. 2d at 1190-93 (also incorporating analysis from *Ashmus I*, 935 F. Supp. at 1072-74).

The State also urges that Rule 76.5 makes section 20 a rule of court and therefore mandatory. To be sure, Rule 76.5 is a rule of court, but it says only that the court shall "consider" the section 20 guidelines, and the guidelines themselves require nothing. *See* Cal. R. Ct. 76.5(b); *see also Wright*, 944 F.Supp. at 466 (concluding that "guidelines for establishing [competency] standards [that provide] ... no indication how many of the delineated criteria MUST be met" do not satisfy 28 U.S.C. § 2261(b)). Also, under California's unitary review scheme the section 20 guidelines need not be applied in any form if the court contracts with an "administrator" to supervise the appointed counsel, *see* section 20(d), and the State points to no standards of competency for such an administrator. Rule 76.5 does not aid the State.

The State also claims that section 20 has become binding (and a rule of court) because it has been adopted by the California Supreme Court. The State presents some evidence that the section 20 considerations have been used by the California Supreme Court as an "initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal." *Ashmus II*, 31 F. Supp. 2d at 1192 (internal quotation marks omitted). We agree, however, with the district court; the California Supreme Court's compliance in practice with a hortatory guideline does not meet the federal statutory command. *See id.*[18]

Finally, the State argues that a qualifying state's competency standards need not be contained in a rule of court or statute as long as they are provided for in one, and that California Government Code § 68511.5 and California Rule of

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18. The State suggests that the district court's requirement of mandatory competency standards is inconsistent with "[t]he latitude afforded to the states in defining specific standards of counsel competence." 1991 Analysis, 137 Cong. Rec. at S3220. Not so. We do not address here the "specific standards" adopted by the State of California; we address only whether those standards are mandatory or hortatory.

Court 76.5 so provide. We decline to read the statute ("The rule of court or statute must provide standards of competency") to encompass a rule of court or statute that merely authorizes the promulgation of competency standards in some other instrument. Such an interpretation is contrary to the unambiguous meaning of the statute.[19] But even if we were to adopt the construction urged by the State, it would not affect our analysis. Rule 76.5 and section 68511.5 do not require the promulgation of competency standards; at best, they merely permit them. *See* Cal. Gov't Code § 68511.5 (requiring only the adoption of "procedures for the appointment of counsel in all appellate districts"); Cal. R. Ct. 76.5(a) (requiring only the adoption of "procedures for the appointment of counsel in criminal cases"). Moreover, section 68511.5 contemplates the appointment of counsel on direct, not collateral, appeal. *See supra* note 12. Finally, the substantive competency guidelines actually promulgated by the State (and contained in section 20) are recommendations to the courts only, and cannot satisfy the statutory requirement that such standards be mandatory and binding.

We therefore reject the State's argument that the unitary review scheme that it adopted in June 1989 meets the Chapter 154 requirement that "[t]he rule of court or statute must provide standards of competency for the appointment of [collateral] counsel."

CONCLUSION

The State of California seeks to opt-in to the procedural advantages of Chapter 154 of the AEDPA with respect to Troy A. Ashmus' petition for federal habeas corpus. The State has not demonstrated, however, that it has complied with the

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19. The conclusions of other courts that have examined the issue contradict the State's view. *See Mata*, 99 F.3d at 1267; *Zuern v. Tate*, 938 F.Supp. 468, 471 (S.D. Ohio 1996).

unambiguous requirements of that statute. During all times relevant to this appeal, and at least until 1998, California failed to establish "by rule of its court of last resort or by statute" a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners. California also failed to provide mandatory and binding standards of competency for collateral counsel in a "rule of court or statute."

The order of the district court is

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 93-0594 TEH

TROY A. ASHMUS, Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin, Respondent

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[Filed Dec. 24, 1998]

ORDER RE: APPLICABILITY OFCHAPTER 154

I. BACKGROUND

A. Introduction

This matter comes before the Court on respondent's request that the parties submit supplemental briefs addressing the applicability of Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[1/] to these proceedings. Chapter 154 provides expedited habeas review

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1. Pub.L. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (Apr. 24, 1996), *amending* 28 U.S.C. §§ 2244 and 2253-55 (modifying existing Chapter 153), *and further codified at* 28 U.S.C. §§ 2261-66 (adding Chapter 154).

procedures and other substantive benefits to states that qualify to "opt in." In order to qualify, states must establish a system to assure that capital defendants receive competent legal representation for their state habeas claims. In view of the important consequences that attend a decision as to whether Chapter 154 applies to these proceedings, the Court granted respondent's request and heard oral argument on the issue on November 9, 1998.

B. Procedural History

Petitioner is a prisoner sentenced to death by the State of California. The California Supreme Court appointed counsel for his automatic appeal on March 4, 1987, and affirmed his conviction and death sentence on December 5, 1991, *People v. Ashmus*, 54 Cal. 3d 932, 2 Cal. Rptr. 2d 112, 820 P.2d 214 (1991), *rehearing denied*, Jan. 29, 1992, *cert. denied*, 506 U.S. 841, 113 S. Ct. 124, 121 L. Ed.2d 79 (1992). Petitioner initiated these federal habeas proceedings on February 17, 1993, by filing an Application for Appointment of Counsel and a Request for Stay of Execution. Current counsel for petitioner were appointed in August, 1995.

On April 24, 1996, the same day that President Clinton signed AEDPA into law, Petitioner filed a class action with this Court seeking declaratory and injunctive relief from California's attempt to "opt in" and apply Chapter 154 against a class of capital defendants. *Ashmus, et al. v. Calderon, et al.*, No. C96-1533 TEH (N.D. Cal.). After extensive briefing and hearings on the issue the Court granted declaratory relief and issued a preliminary injunction enjoining California from asserting Chapter 154. *See Ashmus*, No. C96-1533 TEH (N.D. Cal. May 15, 1996) (Order Modifying and Extending TRO). On June 14, 1996, the Court issued comprehensive findings of fact and conclusions of law. 935 F. Supp. 1048 (N.D. Cal.1996). Although the Ninth Circuit affirmed this decision, *Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir.1997), the Supreme Court reversed and remanded with instructions to

dismiss the complaint for want of an Article III case or controversy sufficient to confer federal jurisdiction over the class action. *Calderon v. Ashmus*, ___ U.S. ___, 118 S. Ct. 1694, 140 L. Ed.2d 970 (1998). The Supreme Court did not reach the merits of any rulings made by this Court or the Ninth Circuit regarding the applicability of Chapter 154.[2/] This Court subsequently dismissed the class action, *Ashmus*, No. C96-1533 TEH (N.D. Cal. Oct. 28, 1998) (Order Dismissing Complaint & Dissolving Injunction), and California has re-asserted the applicability of Chapter 154 in numerous capital cases statewide, including petitioner's. For the reasons enumerated below, the Court finds that California does not meet the requirements for applying Chapter 154 to petitioner.

II. DISCUSSION

A. The Statute: Chapter 154

For over a decade Congress has contemplated habeas corpus reform. Indeed, Title I of AEDPA represents the culmination of legislative deliberation on the subject going back to a 1989 proposal by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases. Formed by Chief Justice William Rehnquist in June of 1988 and chaired by former Associate Justice Lewis Powell, the committee was charged with "inquir[ing] into the `necessity and desirability of legislation directed toward avoiding delay and lack of finality'

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2. Although respondent correctly insists that this Court's ruling and the ruling of the Ninth Circuit are no longer binding precedent, the reasoning of these decisions retains persuasive force even if only as guidance on recurring issues. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir.1994) (vacated decision, although not binding, "is still persuasive authority").

in capital cases ...."[3] Chapter 154 essentially codifies the proposal made by the Powell Committee. *See Ashmus*, 935 F. Supp. at 1055-56.

Chapter 154 provides two distinct methods for states to "opt in" and invoke Chapter 154's rules designed to reduce delay and enhance finality: (1) a "post-conviction" procedure for states that provide, among other things, competent habeas counsel following final state conviction, and (2) a "unitary review procedure" for states that provide competent counsel for an integrated or simultaneous collateral and direct appeal.[4] Although California is attempting to opt in under the unitary review procedure, it is worth detailing the requirements of both procedures since a proper construction of each will benefit from examination of the other.

The post-conviction procedure is set forth in section 2261. According to section 2261, Chapter 154 "shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence ... *only if* the provisions of subsection (b) and (c) are satisfied." 28 U.S.C. § 2261(a) (emphasis added). Subsection (b) provides:

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3. Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNA) 3239 (Sept. 27, 1989) (the "Powell Committee Report"); cited hereinafter at 135 Cong. Rec. S13471-04, 13481 (as appended to S. 1760, a bill incorporating the Powell Committee's recommendations).

4. The most significant addition to the Powell Committee proposal is the section permitting a state to opt in if it has a qualifying unitary review procedure. 28 U.S.C. § 2265. The Powell Committee considered and proposed a qualifying procedure for post-conviction collateral attack--unitary review procedures were not proposed until later. *See* 137 Cong. Rec. at S3221-22 (March 13, 1991) (Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991) [hereinafter "1991 Analysis"]. The relevant portions of the Comprehensive Violent Crime Control Act are identical to the Chapter 154 legislation signed into law as part of AEDPA.

> This chapter is applicable if a state establishes by statute, rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

28 U.S.C. § 2261(b). Subsection (c) requires that any mechanism established "must offer counsel to all State prisoners under capital sentence." 28 U.S.C. § 2261(c). The mechanism must further "provide for the entry of an order by a court of record" which either appoints counsel "upon a finding that the prisoner is indigent and has accepted the offer" or denies appointment on grounds that the prisoner intelligently rejected the offer or was not indigent. *Id.* Unless expressly requested by the prisoner, no counsel who represented the prisoner at trial or on direct appeal may be appointed for the habeas representation. 28 U.S.C. § 2261(d). Finally, subsection (e) precludes habeas relief for ineffective or incompetent counsel during the State or Federal post-conviction process. 28 U.S.C. § 2261(e).

The unitary review procedure for appointment of competent counsel is almost identical to section 2261(b):

> For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation,

> and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

28 U.S.C. § 2265(a). Thus the only difference, apart from covering states that integrate direct appeal and collateral attacks, is that section 2265(a) does not allow for a mechanism to be established by an "agency authorized by state law." *Cf.* 28 U.S.C. § 2261(b). Only a statute or rule of court can establish a mechanism under section 2265(a). Following and incorporating section 2261(c), the unitary review procedures require states to offer and appoint counsel for all indigent capital defendants who accept in order to qualify for the benefits of Chapter 154. 28 U.S.C. § 2265(b). The unitary review procedures also preclude trial counsel from representing a capital defendant in his direct appeal and collateral attack. *Id.*; *cf.* 28 U.S.C. § 2261(d).

To summarize, under both qualifying procedures, a state must establish: (1) a mechanism for appointment, compensation and payment of reasonable litigation expenses of competent counsel; and (2) standards provided by statute or rule of court to assure the competency of appointed counsel. Subject to narrow exceptions, a state must also offer and appoint, by entry of a court order, counsel for *all* indigent capital prisoners. Failure to establish any of these qualifying procedures is fatal to a claim that Chapter 154 applies.

B. The Quid Pro Quo

There are significant procedural and substantive benefits inuring to a state that qualifies to apply Chapter 154. *See Lindh v. Murphy*, 521 U.S. 320, ___, 117 S.Ct. 2059, 2063, 138 L.Ed.2d 481 (1997) (where Chapter 154 applies, "it will have substantive as well as purely procedural effects"). First,

prisoners may not assert ineffective assistance of counsel appointed under the qualifying procedures. 28 U.S.C. § 2261(e). Second, relying on the thoroughness mandated at the state level by the qualifying procedures, Chapter 154 modifies prisoner's *federal* habeas rights to provide an expedited review process.[5/] Finally, and most importantly for Troy Ashmus, AEDPA provides that "Chapter 154 ... shall apply to cases pending on or after the date of enactment of this Act." 104 Pub.L. 132, 110 Stat. 1226, Section 107(c). The Supreme Court has recently suggested that this provision gives Chapter 154 retroactive effect. *Lindh*, 117 S.Ct. at 2064 ("chapter 154 applies to pending cases when its terms fit those cases at the particular procedural points they have reached").

The right of any given state to enforce the expediting provisions of Chapter 154 is therefore contingent on finding that the state has met its obligation to provide a comprehensive mechanism for competent representation of indigent capital prisoners. Congress intended the federal judiciary to assess whether a state has met this obligation. *See Ashmus*, 935 F. Supp. at 1057 n.8 (Although states should be given "wide latitude" to establish a mechanism that complies, "'[t]he final judgment as to the adequacy of any system for the appointment of counsel ... rests ultimately with the federal judiciary.'") (quoting 1991 Analysis, 137 Cong. Rec. S3220, S3242). As

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5. *See* 28 U.S.C. § 2263 (six month period to file for federal habeas relief after final state affirmance of conviction and sentence of death on direct review); § 2264 (limiting federal review to claims raised and decided on the merits in state courts unless narrow exceptions apply; incorporating new standards of proof favorable to state set forth in section 2254(d)); § 2266(a) (federal courts shall give priority to applications for relief under Chapter 154); § 2266(b) (district court must render final judgment within six months of application; no delay allowed due to congestion of court calendar; right to amend application limited); § 2266(c) (court of appeals must render final judgment within 4 months of briefing; en banc rehearing to be granted or denied within 30 days after petition for rehearing or receipt of responsive briefing; en banc ruling to follow within 4 months of the order granting rehearing).

courts have uniformly held, Chapter 154 explicitly contemplates a quid pro quo relationship. *See Lindh*, 117 S.Ct. at 2063 (AEDPA "creates an entirely new chapter 154 with special rules favorable to the state party, but applicable *only if* the State meets certain conditions") (emphasis added); *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (holding that "the Act establishes a quid pro quo relationship: A state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful"), *cert. denied*, ___ U.S. ___, 117 S.Ct. 503, 136 L.Ed.2d 395 (1996).[6] Unless a state affirmatively establishes that each condition described in Chapter 154 has been met, it may not claim the chapter's benefits. *See id.* This is the price of stronger finality rules and greater deference to state habeas proceedings.

As the Powell Committee Report made clear, the logic of this structure is straightforward. The states' legitimate interests in finality, comity and enforcement of its criminal laws[7] must be balanced against both the importance of the "Great Writ" [8] and the essential role of competent representation in ensuring

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6. *Accord: Weeks v. Angelone*, 4 F.Supp.2d 497, 506 (E.D.Va.1998); *Moseley v. Freeman*, 977 F.Supp. 733, 737 n. 9 (M.D.N.C.1997); *Mills v. Anderson*, 961 F.Supp. 198, 200 (S.D.Ohio 1997); *Breard v. Netherland*, 949 F.Supp. 1255, 1261 (E.D.Va.1996); *Hamblin v. Anderson*, 947 F.Supp. 1179, 1180 (N.D.Ohio 1996); *Wright v. Angelone*, 944 F.Supp. 460, 463 (E.D.Va.1996); *Hill v. Butterworth*, 941 F.Supp. 1129, 1134 n. 3 (N.D.Fla.1996), *remanded*, 133 F.3d 783 (11th Cir.1997), *rev'd for lack of case or controversy*, 147 F.3d 1333 (1998); *Ashmus*, 935 F.Supp. at 1056.

7. On the states' interests see *In re Clark*, 5 Cal.4th 750, 764 and 776, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993).

8. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996) (the writ protects "an important interest in human liberty"); *In re Clark*, 5 Cal.4th at 763-64, 21 Cal.Rptr.2d 509, 855 P.2d 729.

due process and protecting the constitutional rights of capital defendants:

> The relatively small number of executions, as well as the delay in cases where an execution has occurred, makes clear that *the present system of collateral review operates to frustrate the law of 37 states.* The collateral review process tends to be erratic and frequently is repetitious.... This Committee believes that any serious reform proposal must address the problems of delay and repetitive litigation.
>
> A second serious problem with the current system is the pressing need for qualified counsel to represent inmates in collateral review.... [T]he lack of adequate counsel causes severe problems.... In sum, the Committee believes that *provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.*

135 Cong. Rec. S13482 (emphasis added). The Powell Committee Report framed its proposal as an effort to strike a proper balance of these interests by making a state's use of Chapter 154 voluntary, but contingent on meeting capital defendants' needs for adequate representation:

> The Committee's proposal is aimed at achieving this goal: Capital cases should be subject to one complete and fair course of collateral review in the state and federal system ... with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end. The proposal allows a State to bring capital litigation by its prisoners within the new statute by providing competent counsel for inmates on state collateral review. Participation in the proposal is thus optional with the States. Because it is optional, the proposal should cause minimal intrusion on state prerogatives. But for States that are concerned with delay

> in capital litigation, it is hoped that the procedural mechanisms we recommend will furnish an incentive to provide the counsel that are needed for fairness.

Id. at S13482-S13483; *see also* House Committee on the Judiciary, Effective Death Penalty Act of 1995, H.R.Rep. No. 23, 104th Cong., 1st Sess., at 10 (1995) (House Report Accompanying AEDPA) ("In essence the Powell Committee proposal addresses [the problem of an endless habeas review process] through a quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants."). The conditional language in sections 2261 and 2265 (i.e., that Chapter 154 shall apply *if* qualifying mechanisms are established) reflects an explicit incorporation of the quid pro quo arrangement envisioned by the Powell Committee.

C. The Date for Assessing Compliance With Chapter 154

Where, as here, a state wishes not merely to invoke Chapter 154 prospectively, but rather to reach back and apply Chapter 154 to a pending case, the Court faces the difficult task of determining when to assess whether the state had qualifying procedures in place. By permitting states to apply chapter 154 to pending cases Congress clearly contemplated the possibility that some states would already have qualifying procedures in place. *But see Scott v. Anderson*, 958 F.Supp. 330, 332 (N.D.Ohio 1997) (holding that explicit and detailed language chosen by Congress for qualifying procedures must be strictly followed; denying attempt to opt-in even though state's system for appointment and training of counsel was "one of the most careful and comprehensive systems in the country ... [which] undoubtedly Congress had in mind ... when it envisioned the concept of `opt-in' states."); *Hill*, 941 F.Supp. at 1134 ("Congress ... did not intend that the new habeas provisions would necessarily apply to every state, but only those states that `opt-in' to the Act by meeting certain preconditions.").

Moreover, states laboring under the burden of excessive, repetitive or protracted habeas litigation obviously have an interest in contending that they have provided qualifying procedures as far back as possible in order to apply Chapter 154 to as many pending cases as possible. Nevertheless, Congress also clearly mandated compliance with the quid pro quo arrangement--no state is entitled to the benefits of Chapter 154 unless the qualifying procedures are "established." This reflects the simple judgment by Congress, well documented in the legislative history, that greater deference to state proceedings is only appropriate after states have genuinely provided a mechanism that assures competent counsel to petitioners whose federal habeas rights would be restricted.[9/]

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9. In *Lindh*, the Supreme Court recognized but did not resolve the thicket regarding Chapter 154's retroactivity and temporal reach. On the one hand, the Court relied on Chapter 154's express statement of application to cases pending at enactment in order to conclude that Chapter 153, which contains no such statement, is not retroactive. 117 S.Ct. at 2063. On the other hand, the Court recognized that determining whether a state is entitled to assert Chapter 154 in specific cases pending at enactment "may well [raise] difficult issues" requiring application of "*Landgraf's* default rule." *Id.* at 2064. In a footnote, the Court also suggested that, on its face, Chapter 154 lacks the kind of clear, unambiguous statement traditionally required to permit retroactive effect. *Id.* at n. 4. Although the parties have not directly raised this issue, the Court notes that application of Chapter 154's expedited review procedures in a unitary review state to capital defendants such as petitioner raises many of the traditional concerns associated with retrospective legislation. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 265-268, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (noting that "statutory retroactivity has long been disfavored" and discussing traditional concerns such as "elementary considerations of fairness," "sweep[ing] away settled expectations suddenly and without individualized consideration," the possibility of "us[ing] retroactive legislation as a means of retribution against unpopular groups or individuals," and the Due Process Clause, which "protects the interests in fair notice and repose that may be compromised by retroactive legislation").

Despite the ambiguity in *Lindh*, this Court will follow the Supreme Court's holding that "in determining a statute's temporal reach ... normal rules of construction apply." 117 S.Ct. at 2063. Thus, mindful of the concerns that retrospective application raises, the Court examines the

Thus in determining whether California has "established" qualifying procedures, the Court must carefully examine whether the quid pro quo has truly been met or whether the state is overreaching. The Court believes that in order to apply Chapter 154's expedited review provisions retroactively, California must show that qualifying procedures were in place when the capital defendant would have been entitled to the benefits prescribed by these procedures. *See* Powell Committee Report, Comment, 135 Cong. Rec. S13483 ("[T]o avail itself of [Chapter 154's] more structured habeas corpus review procedures, a State would have to establish a system for the appointment and compensation of competent counsel throughout *all stages* of state post conviction review. The purpose of this mechanism is to assure that collateral review will be fair, thorough, and the product of capable and committed advocacy.") (emphasis added).[10/] In a unitary review state such as California, the qualifying procedures should be present from the date appellate counsel is appointed. It is during this time that a petitioner should legitimately expect and receive the benefits of a state's mechanism for providing adequate counsel (e.g., offer of counsel, appointment according to standards of competence provided by rule of court or statute,

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retrospective temporal reach of Chapter 154 by looking first to the quid pro quo structure established by Congress. Where the quid pro quo is not met, Chapter 154 shall not apply.

10. Although this quote refers to post conviction procedures because unitary review was not then part of the habeas reform legislation, there is no reason to assume that Congress intended anything different in the unitary review context. Unless a state provides a system for appointment and compensation of competent counsel "throughout all stages" of unitary review, it may not assert Chapter 154. *See* 1991 Analysis, 137 Cong. Rec. S3221 (under a unitary review procedure "the defense is authorized to raise 'off the record' claims--as well as the normal claims cognizable on appeal--*at the initial stage of review beyond the trial*") (emphasis added); *id.* at S3222 ("a qualifying unitary review procedure would have to include appointment of counsel for indigents *following trial* for purposes of unitary review.... [N]ew counsel would have to be appointed at the start of the unitary review process ....") (emphasis added).

reasonable compensation, and payment for reasonable litigation expenses). Any other rule does violence to the concept of a quid pro quo relationship.

Courts considering when to assess a state's qualifying procedures in the post- conviction context under section 2261 have noted the same concerns and taken comparable positions. In *Wright*, for instance, the court reasoned:

> Surely Congress did not intend for a state to reap the benefits of the statute unless the petitioner whose case would be subject to the expedited review also enjoyed the "quid pro quo benefits" of the state's enhanced right to counsel provisions during the post-conviction review process.
> Whether a state's system satisfies the requirements of [Chapter 154] should be determined by examining the system as it existed at the time a petitioner first received appointment of counsel in the post-conviction process. It is at this time that a petitioner is first subject to the state's procedures, and would therefore be entitled to enjoy the protections of the state' system.

944 F. Supp. at 463 (rejecting claim that current system should be examined to determine whether state qualifies to opt in) (citing *Ashmus*, 935 F.Supp. at 1057); *see also* Weeks, 4 F. Supp. 2d at 506 n. 6; *cf., Bennett*, 92 F.3d at 1342 (state's mechanism could not qualify state to opt in where mechanism was not established until after state habeas petition had been finally denied); *Satcher v. Netherland*, 944 F. Supp. 1222, 1243 (E.D. Va.1996) (state could not opt-in where system in effect when habeas petition was finally denied was deficient), *rev'd on other grounds and aff'd*, 126 F.3d 561 (4th Cir.1997), *cert. denied, Satcher v.. Pruett*, --- U.S. ----, 118 S.Ct. 595, 139 L.Ed.2d 431 (1997).

A number of other consequences follow from the quid pro quo relationship. First, as the party seeking to obtain the

benefit of Chapter 154's expedited review provisions, the burden is properly placed on the state to demonstrate that all of the qualifying procedures have been established. As the Powell Committee Report commented, it is entirely the states' decision whether to opt-in--by so choosing the states are properly allocated the burden of proving compliance. Second, as courts have confirmed, the language of the qualifying procedures and the quid pro quo structure of Chapter 154 demand strict rather than substantial compliance with all preconditions. *See Weeks*, 4 F. Supp. 2d at 507 (following rule of strict compliance with requirement for appointment and compensation mechanism); *Mills*, 961 F. Supp. at 201 ("The provisions of § 2261 are drafted with mandatory language and neither substantial compliance nor de facto compliance is sufficient."); *Scott*, 958 F. Supp. at 332 (same); *Breard*, 949 F. Supp. at 1262 ("'substantial compliance' with the Act's requirements is not sufficient"); *Hamblin*, 947 F.Supp. at 1182 ("Congress did not write Chapter 154 in terms of substantial compliance"); *Wright*, 944 F.Supp. at 464 (same). As one court aptly summed the issue:

> If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so; and instead, Congress chose to confer those benefits *only if the State made an affirmative, institutionalized, formal commitment* to provide a post-conviction review system which Congress considered to be "crucial to ensuring fairness and protecting the constitutional rights of capital litigants." Powell Committee Report at 3240. Where, as here, that commitment has not been made in the manner, and to the extent, prescribed by Congress, the state is not entitled to the very significant benefits accorded by the Act.

Satcher, 944 F.Supp. at 1242 (emphasis added). The *Satcher* court's insistence that a state must establish a system reflecting

"an affirmative, institutionalized, formal commitment" to habeas representation resonates not only with the requirement that qualifying procedures be mandatory and carry the force of law,[11] but also with Congress' choice of the word "mechanism" which plainly suggests that qualifying procedures must not suffer from incoherence or incompleteness.[12]

With this statutory and decisional background in mind, the Court now turns to Respondent's claim that California may invoke Chapter 154 against Mr. Ashmus.

D. California's Unitary Review Mechanisms Are Inadequate

Respondent claims that these proceedings are governed by the provisions of Chapter 154 "[b]ecause the capital review procedures in effect when petitioner's judgment was unanimously affirmed on direct appeal by the California Supreme Court on December 5, 1991, (and indeed, at all times since June 6, 1989) constitute a qualifying mechanism for unitary review within the meaning of 28 U.S.C. § 2261 and § 2265 ...." Resp. Supp. Mem. at 2. Respondent again offers what it has previously referred to as a " `comprehensive scheme of interlocking, cross-implementive provisions,'" *Ashmus*, 935

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11. *See Ashmus*, 123 F.3d at 1208 (state does not qualify under Chapter 154 with non-binding competency standards); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir.1996) (same), *vacated in part on other grounds*, 105 F.3d 209 (1997); *Wright*, 944 F.Supp. at 467 (same); *see also Hamblin*, 947 F.Supp. at 1181-82 (state cannot opt in because appointment mechanism confers discretion to refuse to appoint if state finds no merit in claims).

12. Although a single statute or rule of Court is not required, a *system* must be affirmatively established and readily discernable, especially if it is claimed to arise from multiple pre-existing sources. "Post hoc rationalization" from a set of evolving, non-binding policies and guidelines will not suffice. *Ashmus*, 935 F.Supp. at 1072; *see also Wright*, 944 F.Supp. at 465 (rejecting state's "piecemeal attempt to pull together the various provisions and argue that this collection satisfies the `mechanism' required by Congress").

F.Supp. at 1056, and argues that this scheme became effective June 6, 1989. The scheme is composed of the following array of legislative and judicial sources:

(1) Cal. Gov't Code § 68511.5 (effective Jan. 1, 1984);
(2) Cal. Rule of Court 76.5 (effective Jan 1, 1985);
(3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective Jan. 1, 1985);
(4) Introductory Statement, Cal. Rules of Court (effective Jan. 1, 1992);
(5) Cal.Penal Code § 1241 (enacted 1955);
(6) Cal. Gov't Code § 68070 (effective as amended Oct. 3, 1977);
(7) California Supreme Court Statement of Policies Regarding Cases Arising From Judgment of Death (the "1989 Policies") (adopted and effective June 6, 1989);
(8) California Supreme Court Internal Operating Practices and Procedures ("IOPP"), Sections XIV.A and XV.A (adopted Summer 1985, revised December 1989 and in 1995);
(9) California Supreme Court Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants ("Payment Guidelines") (revised Sept. 19, 1990, and Dec. 22, 1993);
(10) California Supreme Court Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings ("Fixed Fee Guidelines") (effective Jan. 1, 1994);
(11) Cal. Rule of Court 76.6 (effective February 27, 1998); and
(12) Cal. Gov't Code § 69650 *et seq.* (effective Jan. 1, 1998).[13/]

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13. The Court will not examine the extensive 1998 amendments to the state's alleged qualifying mechanisms in any detail. Whether California currently qualifies to assert Chapter 154 is irrelevant to the question whether it qualifies to assert Chapter 154 against petitioner. If anything,

Having determined that the quid pro quo must be satisfied by the date counsel for direct appeal is appointed, the Court could conclude its analysis here since respondent concedes (as he must) that no qualifying mechanisms were in place prior to June 1989. *See* Resp. Supp. Mem. at 2; *see also Ainsworth v. Calderon*, 138 F.3d 787, 790 (9th Cir.1998) (holding that "California does not meet the conditions requisite for applying the provisions of the Act to" petitioner whose direct appeal concluded in 1988); *McDowell v. Calderon*, 107 F.3d 1351, 1355 n. 1 (9th Cir.1997) (declining to apply Chapter 154 because state conceded Chapter 154 not applicable prior to 1989 where petitioner's direct appeal concluded in 1988).[14/]

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these amendments suggest a recognition of the part of the state that more comprehensive, coherent and mandatory procedures are necessary for California to opt in.

14. Respondent argues that these decisions are inapposite since, in both, the petitioner's direct appeal concluded in 1988, a year before the 1989 Policies required appellate counsel to raise habeas claims in their direct appeals. In contrast, Ashmus' conviction and sentence was not affirmed by the California Supreme Court until December 5, 1991, well after the 1989 Policies allegedly made California a unitary review state. Resp. Rply. Mem. at 4. Respondent then argues that the date Ashmus was appointed counsel is irrelevant. *Id.* at 4 n. 1 ("Irrespective of when the appointment of Ashmus' state counsel was initially entered, that appointment was extended to collateral representation by state law *during* the pendency of state supreme court review.") (emphasis original). Respondent's effort to distinguish *Ainsworth* and *McDowell* does not undermine the Ninth Circuit's conclusion, based on the state's concession, that California had not satisfied its quid pro quo requirements before 1989. The decisions express no opinion on the question when or whether California has since qualified, nor do they hold that the date a conviction and sentence of death becomes final under direct review is the benchmark for assessing Chapter 154 compliance.

This Court adheres to the rule that the date of state counsel's appointment is the proper benchmark. Perverse results attend any rule with a later benchmark. Under respondent's "date of state affirmance" rule (and assuming that the 1989 Policies actually established a qualifying mechanism), Chapter 154 would apply to petitioner even though for at least half the period between appointment of counsel and affirmance of his conviction his state counsel had no obligation and no funding to pursue

However, as the following examination of the state's alleged qualifying mechanisms reveals, even if a later date is chosen for measuring compliance with the quid pro quo (e.g., 1991, when petitioner's conviction and sentence received final affirmation at the state level), California does not qualify.[15/]

1. Does California Authorize Unitary Review?

As an initial matter the Court must determine whether the state has created a "unitary review" procedure. *See* 28 U.S.C. § 2265(a) ("[A] `unitary review' procedure means a state procedure that *authorizes* a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack.") (emphasis added). The Court addressed this question in the class action and answered it in the affirmative. *Ashmus*, 935 F. Supp. at 1069-70 (citing legislative history referring to California as a unitary review state). However, it is worth noting that, prior to the June 6, 1989, California did not authorize unitary review. Until the June 1989 Policies became effective, California did

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collateral claims. Moreover, any counsel appointed for direct review before the 1989 Policies (again, assuming the Policies established a qualifying mechanism), were not appointed by a process that involved any procedures for assessing and ensuring competency in the area of habeas review. Congress could not have intended that providing collateral counsel at some time during the period of direct review was adequate under the unitary review procedures. Instead, capital defendants subject to unitary review procedures must have received competent habeas representation for the length of their direct review in order for the state to fairly assert Chapter 154 and curtail their federal habeas rights. This is the essence of the quid pro quo requirement. Respondent's invitation to bend this requirement in the direction of substantial compliance is not well taken.

15. Other California courts recently considering the issue have reached the same conclusion. *See Montiel v. Calderon*, No. Civ. F-96-5412 OWW (E.D.Cal. Dec. 21, 1998) (Order Regarding Respondent's Motion to Apply Chapter 154 to Pending Death Penalty Cases) (holding that California does not qualify to opt in where petitioner's conviction was affirmed after the 1989 Policies); *Ross v. Calderon*, No. Civ. 96-2720 SVW (C.D.Cal. Dec. 17, 1998) (Order Granting Motion to Dismiss) (same).

not fund or require appellate counsel to "investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus."[16] 1989 Policies, Timeliness Standards 1-1 to 1-3, Court Rules, Vol.23, pt.3 at 143-46 (West 1996); *see also In re Clark*, 5 Cal.4th at 783-84, 21 Cal.Rptr.2d 509, 855 P.2d 729 ("The Policies ... for the first time, impose[d] an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus."); *see also* 1991 Analysis, 137 Cong. Rec. at S8717 n. 3 (Remarks of Daniel E. Lungren, Atty. Gen. of California) (citing the 1989 Policies for proposition that California has adopted unitary review procedures). Therefore, California did not become a unitary review state until more than two years after the date Ashmus' appellate counsel was appointed.[17]

Respondent dismisses this claim, arguing that, by their terms, the 1989 Policies applied to all pending and previously resolved appeals from judgments of death. *See In re Clark*, 5 Cal.4th at 785, 21 Cal.Rptr.2d 509, 855 P.2d 729. Thus, respondent argues that, as of June 6, 1989, petitioner's appellate counsel was obliged to investigate and pursue collateral claims. Even if this is true, it should not bootstrap the period for assessing the state's compliance from the date counsel was appointed to the date unitary review was authorized. To hold otherwise would subject petitioner to a form of double

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16. There is some suggestion in *In re Clark* that habeas issues could have been raised by appellate counsel prior to the 1989 Policies. *See id.* at 782, 21 Cal.Rptr.2d 509, 855 P.2d 729. Respondent does not make this argument, however, and the Policies in effect prior to 1989 advocated waiting to raise collateral issues until after the direct appeal. *See also* IOPP XIV.A.4 (stating that the supreme court will appoint an attorney for habeas review "*after* the termination of the party's state appeal") (emphasis added).

17. Moreover, respondents concede that, prior to April 24, 1991, the orders of court appointing appellate counsel did not state that the appointment extends to representation in any related habeas proceeding. Decl. of M. Jameson ¶ 4. Thus, before April 1991, appellate counsel had no direct notice of their unitary review authority or obligations.

retroactivity--i.e., because appellate counsel became unitary review counsel, de jure, after June 6, 1989, Chapter 154 applies retroactively not only to all petitioners who received counsel *after* June 1989, but to petitioners like Ashmus whose direct appeals were *pending* as of June 1989.

2. Is There a Mechanism for Offer, Appointment, Compensation and Payment of Competent Counsel?

Section 2265(b) mandates a state to offer counsel following trial and section 2265(a) mandates that a state establish, by statute or rule of court, a mechanism for appointment, compensation and reimbursement of reasonable litigation expenses for competent counsel. All state prisoners under capital sentence are entitled to the offer, and all prisoners are entitled to appointment "upon a finding that the prisoner is indigent and accepted the offer ...." 28 U.S.C. § 2261(c)(1) (incorporated into section 2265(b)). Respondent contends that its qualifying mechanism for appointment, compensation and payment arises from a number of sources.

a. Offer and Appointment

According to California Supreme Court Internal Operating Practice and Procedure XIV.A, "[i]n criminal matters, upon a verified or certified statement of indigency, the court, acting through the clerks office, will appoint an attorney for a party ... [i]n capital cases" for appeals to the California Supreme Court and the United States Supreme Court, for applications for executive clemency, and for the conduct of sanity hearings. Court Rules, Vol. 23, pt. 3 at 141 (West 1996). After the 1989 Policies, the scope of appointments in capital cases was extended to collateral representation. *Id.* at XIV.D (incorporating the authorization for unitary review from the 1989 Policies). Respondent also offers the declaration of the deputy clerk of the California Supreme Court who claims that (1) "[a]ll capital defendants are offered the opportunity to have counsel appointed to represent them in all litigation before the

[California Supreme Court] concerning their judgment of conviction of death," (2) "[a]ll capital inmates whose judgments ... have been affirmed on or after June 6, 1989, have been determined to be indigent and have qualified for appointment of counsel," and (3) appointments of counsel are "always made by orders of Court ...." Decl. of M. Jameson, ¶¶ 3-4.[18] According to respondent, these sources satisfy the offer and appointment provisions of Chapter 154. The Court is not persuaded.

In the class action, the Court held that California did not meet Chapter 154's offer requirement because in many cases it takes years to actually appoint counsel after an offer is accepted. *Ashmus*, 935 F.Supp. at 1074-75. The Court found that there was a backlog of approximately 130 condemned California inmates who had not yet been appointed counsel. *Id.* at 1055 (also noting respondent's admission that "[e]very inmate who is awaiting appointment of counsel *has* been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself") (emphasis original).[19] Section 2261(c), incorporated by § 2265(b), states that a qualifying mechanism "*must*" appoint counsel "upon a finding that the prisoner is indigent and accepted the offer ...." 28 U.S.C. § 2261(c). Respondent's principal contention now is that appointment need not be immediate. Admitting that significant delays persist, respondent nevertheless claims that the statute "imposes absolutely no time limit on the appointment of state counsel as a condition of its application ...." Resp. Supp. Mem. at 11. That counsel must be appointed

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18. Ms. Jameson does not aver that these offer procedures were in effect in 1987 when petitioner's appellate counsel was appointed.

19. *See also* Resp. Supp. Mem., Attachment D at 6 (noting that "[a]s of October 1, 1996, there were 467 defendants on death row. Of the 284 direct appeals pending in California, there were *146* awaiting appointment of counsel. There are 32 to 36 new judgments of death entered each year and 19 to 26 counsel appointed each year. Thus, each year the number of defendants without counsel grows larger.") (emphasis added).

"*upon* a finding" of indigency and acceptance of the offer, respondent insists, "simply does not denote `immediacy.'" *Id.* at 12.

Respondent's argument flies in the face of the statute's plain meaning as well as the legislative history. As respondent openly concedes, "upon" can mean either "on condition of" or "at the time of ... with little or no interval thereafter." Resp. Supp. Mem. at 12-13 (quoting *Walsh v. Bd. of Admin.*, 4 Cal.App.4th 682, 705, 6 Cal.Rptr.2d 118, 133 (1992)). In the first instance, upon implies no temporal limit; in the second, however, upon means immediately following. The question here is which meaning Congress intended by using upon in section 2261(c). The Court remains confident that it was the latter. First, the legislative history is clear that actual and expeditious appointment was expected: "*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings ...." 1991 Analysis, 137 Cong. Rec. at S3220 (emphasis added). Second, effective and competent habeas representation is compromised by long delays in the appointment of counsel. All of the familiar problems associated with delay arise (memory fades, the record grows cold, and witnesses become unavailable).[20/] Third, under section 2261(c), offer and appointment are mandatory obligations. 28 U.S.C. § 2261(c) (the mechanism "*must* offer counsel ... and *must* provide for the entry of an order by a court of record appointing one or more counsels") (emphasis added). The quid pro quo would be hollow indeed if compliance by the state was satisfied by merely offering and promising to appoint competent counsel with no element of timeliness. As the Ninth Circuit emphasized, no state should be able to avail itself of the six month limitation period in the

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20. *See, e.g.*, Resp. Supp. Mem., Attachment D at 7 (California Appellate Indigent Defense Oversight Advisory Committee admitting that the "growing number of cases without counsel is a matter of serious concern to the court").

federal habeas process when it takes years to appoint state counsel. *Ashmus*, 123 F.3d at 1208. To sanction delays in appointment in unitary review states would allow petitioners' habeas claims to grow stale at the state level even as their federal review is curtailed. Therefore, even if appointment need not be instantaneous, Congress clearly intended a requirement of timeliness in using the word "upon" and California's protracted delays clearly fail this requirement.[21/] Respondent's contention otherwise is but another attempt to skirt its side of the Chapter 154 bargain.[22/]

There is another equally fatal defect in California's offer and appointment mechanism. Internal Operating Practice and Procedure XIV (requiring appointment of counsel in capital cases) and the 1989 Policies (imposing unitary review obligations on appellate counsel) are nonbinding procedures. But Chapter 154's offer and appointment provisions demand a mandatory mechanism--no other conclusion can be drawn from language that states "must" offer and appoint counsel through a mechanism established by statute or rule of court. The only appointment "requirement" to which respondent refers is IOPP XIV.A, which merely announces the Supreme Court's *procedure* or *practice* that "upon a verified or certified

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21. It is worth noting in this regard that section 2261(c) includes only two conditions on appointment--a finding of indigency and acceptance of the offer. Once these conditions are satisfied ("upon" their satisfaction), appointment must follow.

22. Respondent insists that by the enactment of AEDPA, "Congress sought to expedite *federal* review of capital cases, not hasten the pace at which capital adjudication proceeds in *state* courts." Resp. Supp. Mem. at 15 (emphasis original). While this may be true as a general matter, it demonstrates respondent's misunderstanding of the quid pro quo upon which expedited federal review is premised. A state may only enforce expedited federal review if its state process meets the qualifying criteria of Chapter 154. Insofar as delay in appointing state counsel impinges upon or prejudices capital defendants' right to effective, thorough and competent representation at the state level, Congress *was* speaking to the pace of state adjudication.

statement of indigency" the court will appoint an attorney in capital cases.[23] Neither Rule of Court 76.5 (requiring the adoption of "*procedures* for appointment of counsel"), nor Government Code § 68511.5 (requiring the Judicial Council to adopt rules of court "*regulating the selection* of appointed counsel"), raises the status of IOPP XIV.A to a binding requirement that the state appoint counsel to capital defendants.[24] The inadequacy inherent in placing appointment provisions in nonbinding internal operating practices and procedures becomes manifest when considered in conjunction with the delay that attends appointments in California. Capital defendants in California are bereft of any legally enforceable right to appointment of counsel for the pursuit of collateral claims, let alone appointment in a timely fashion. Under these circumstances, the Court cannot conclude that California has a qualifying mechanism for offer and appointment of competent state counsel.

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23. Respondent also fails to point to any procedures that require the state to offer counsel or procedures requiring a finding that decisions to reject offers were made with full understanding of the legal consequences. *See* 28 U.S.C. § 2261(c)(2). The fact that, in practice, the state always makes offers is immaterial. *See Mills*, 961 F.Supp. at 201 (favorable practice of state is irrelevant to assessing compliance with Chapter 154); *Scott*, 958 F.Supp. at 332 (same); *Hamblin*, 947 F.Supp. at 1182 (same); *Satcher*, 944 F.Supp. at 1244 (same).

24. *See also* Introduction to IOPP, Court Rules, Vol.23, pt.3 at 133 (explicitly distinguishing the IOPP from constitutional, statutory and decisional authorities, including Rules of Court, which are binding; noting that the IOPP are merely "observed by the California Supreme Court in the performance of its duties"; and emphasizing that the IOPP may be unilaterally "amended from time to time, as needed").

b. Compensation and Payment of Reasonable Litigation Expenses

Respondent claims that the state has a qualifying mechanism for compensation and payment of litigation expenses by pointing to a "statutory assurance [that] is supplemented in capital cases by a comprehensive array of governing standards and guidelines that are, by their express terms, applicable to the tasks and duties associated with collateral representation in particular." Resp. Supp. Mem. at 9. The "statutory assurance" is California Penal Code § 1241, which states that "[i]n any case in which counsel ... has been appointed by the Supreme Court or by a court of appeal to represent a party to any appeal or proceeding, such party shall receive a reasonable sum for compensation and necessary expenses ...." This assurance is "supplemented" by the Payment and Fixed Fee Guidelines, and the 1989 Policies, which set forth counsel's unitary review duties and applicable compensation standards.

As the Court held in the class action, however, the 1989 Policies "expressly preclude[] compensation for raising certain collateral issues." *Ashmus*, 935 F.Supp. at 1070. According to the 1989 Policies:

> The duty to investigate [grounds for habeas relief] is *limited to* investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims *only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim.* All petitions for writs of habeas corpus should be filed without substantial delay.

> If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay.

Court Rules, Vol. 23, pt.3 at 143-44 (Emphasis added). Thus although the 1989 Policies authorize the expenditure of $3,000 for investigation of potential habeas claims "without prior authorization," *no* funds are actually available to investigate (and there is no duty to pursue) habeas claims unless "appellate counsel is aware of facts which may constitute a basis for habeas corpus relief." *In re Clark*, 5 Cal.4th at 783 n. 19, 21 Cal.Rptr.2d 509, 855 P.2d 729. Moreover, funding beyond the initial $3,000 is only available by filing an application "which identifies the specific issues to be explored and the specific facts which suggest that a basis for a potentially meritorious habeas corpus claim exists." *Id.* At the outset of representation, then, appellate counsel has no duty, authority or funding to find out whether habeas claims exist, and unless a factual predicate for such claims is discovered in the course of preparing claims for direct appeal, there remains no duty, authority or funding to investigate.[25/]

Respondent claims that the 1989 Policies simply prevent state counsel from incurring expenses for "a mere `fishing expedition.' " Resp. Supp. Mem. at 10. However, there is a great difference between a fishing expedition, on the one hand, and competently inquiring into the possible existence of habeas claims, on the other. Indeed, the state has a strong interest in funding the latter--otherwise meritorious habeas claims may be not discovered until and unless funding comes from some other source (most frequently the federal habeas review process). Restricting appellate counsel's duty and funding to investigate habeas claims effectively defers adequate investigation until after direct and habeas review at the state level, and unless the

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25. For this reason California's mechanism for compensation and payment of habeas counsel is inadequate even if, as respondent claims, the 1989 Policies do not restrict compensation to claims discoverable "within the four corner of the appellate record." *See Ashmus*, 935 F.Supp. at 1071, 123 F.3d at 1208; Resp. Supp. Mem. at 10.

state expressly waives the exhaustion requirement, the newly discovered claims must be presented first to the state court. Under the 1989 Policies, the California Supreme Court must then decide whether the new claims are time barred because filed "after substantial delay." *See In re Clark*, 5 Cal.4th at 782-86, 21 Cal.Rptr.2d 509, 855 P.2d 729. This time consuming process, which begins with fundamentally inadequate habeas funding at the state level, results in precisely the kind of delay and repetitive litigation Congress intended Chapter 154's qualifying procedures to eliminate. Recent California Supreme Court precedent confirms the confusion created by California's mechanism.[26/]

The deficiency of California's provisions is brought squarely into relief by comparison to the broader federal standard. Under the federal standard, petitioners are entitled to funding for all "reasonably necessary services." 21 U.S.C. §

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26. The state supreme court has explicitly held that, in raising a habeas claim, "substantial delay" may be excused if a petitioner shows that in earlier state proceedings (1) he and counsel were unaware of "triggering facts" sufficient to meet the standard set forth in the 1989 Policies, and/or (2) that he was denied funds to investigate the claim. *See In re Gallego*, 18 Cal.4th 825, 77 Cal.Rptr.2d 132, 139, 959 P.2d 290 (1998); *In re Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153, 160, 959 P.2d 311 (1998). This rule effectively concedes that the 1989 Policies preclude appellate counsel from investing the time and resources to uncover and develop all but the most immediately evident habeas claims. *See Montiel*, No. Civ. 96-5412 OWW at 20-26. For precedent arguing that the 1989 Policies do not create a discernable rule or standard to follow, see *Morales v. Calderon*, 85 F.3d 1387, 1389-92 (9th Cir.1996) (referring to California's standards regarding appellate counsel's duty to investigate habeas claims as "difficult to articulate," providing "no discernible clear rule," and "applied only at random"), *cert. denied, Calderon v. Morales*, --- U.S. ----, 117 S.Ct. 500, 136 L.Ed.2d 391, *quoted in Ashmus*, 935 F.Supp. at 1071; and *In re Gallego*, 77 Cal.Rptr.2d at 144-50, 959 P.2d 290 (Brown, J., dissenting) (referring to California's standards as "applied as a matter of discretion without regularity," "impossibly amorphous," "nebulous as well as riddled with exceptions"; concluding that "such imprecise, circular, and tautological language does not define a `clear' rule this court can `consistently apply' .... Nor does it even provide guidance.").

848(q)(B). Because Congress chose the words "payment of *reasonable* litigation expenses" in Chapter 154, the federal standard is, by its terms, a much closer fit with the mandate of section 2265(a) than the restrictive language of the 1989 Policies. Although a state may enjoy "wide latitude" in establishing a qualifying mechanism and does not need to meet the federal standard to qualify, the federal standard reflects what Congress likely had in mind, i.e., funding for all reasonable expenses. Since it is immonently reasonable--indeed, a requirement of competent habeas representation[27]--to diligently investigate the possible presence of meritorious habeas claims during direct appeal regardless of whether any "triggering facts" initially justify the inquiry, California's mechanism for compensation and payment cannot qualify under Chapter 154.

Respondent's reference to more recent modifications to the state's compensation and payment procedures (e.g., the Payment and Fixed Fee Guidelines) only bolsters the Court's conclusion that California's procedures have been evolving, albeit haltingly, in the direction of the coherence and completeness required to satisfy Chapter 154. But respondent has provided no evidence or argument that the state affirmatively created a coherent *system* for compensation and payment of competent unitary review counsel. The procedures to which respondent points smack more of "post hoc

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27. As the Court held in the class action, quite apart from compensation and payment, the state's limitations on the duty to investigate habeas claims "create an objectively deficient standard for the performance of counsel appointed to seek collateral relief in satisfaction of Chapter 154's quid pro quo arrangement." *Ashmus*, 935 F.Supp. at 1071 (citing and quoting *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir.1991) for the proposition that prisoners must be able to "'assert all possible violations of ... constitutional rights' and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation.").

rationalization.[28] *Ashmus*, 935 F.Supp. at 1072. The Court further notes that, as with the state's offer and appointment provisions, California's compensation and payment procedures suffer for lack of any prescriptive force. The policies and guidelines supplementing Penal Code § 1241 are not statutes or rules of court and impose no binding obligation for compensation of competent counsel and payment of reasonable litigation expenses.

3. Does California Provide Standards To Ensure Competent Counsel?

Section 2265(a) further requires the state to "provide standards of competency for the appointment of ... counsel" by rule of court or statute. Because respondent continues to rely on section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (entitled "Guidelines for Appointment of Counsel in Criminal Appeals"), the Court hereby adopts, and will not rehearse, its analysis of California's competency standards in the class action. *See Ashmus*, 935 F.Supp. at 1072-74. Instead, mindful of its prior analysis, the Court will turn to respondent's new claims as to why section 20 should be construed as a rule of court.[29]

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28. The fact that the state has just this year adopted dramatic revisions to its compensation and payment guidelines corroborates this assessment. *See Montiel*, No. Civ. 96-5412 OWW at 25-26 (detailing changes and concluding that prior guidelines were inadequate).

29. In addition to the "rule of court" argument, respondent contends that there is no requirement that competency standards be "inflexibly `binding or mandatory'" under Chapter 154. Resp. Supp Mem. at 19. The Court simply notes that this argument not only ignores the considered opinion of this Court and the Ninth Circuit, it contradicts the decisions of other courts that have considered the question. *See Mata*, 99 F.3d at 1267 (interpreting section 2261(b) to require "specific, mandatory standards" of competency; rejecting state's attempt to opt in with a procedure for case-by-case evaluation of competency); *Wright*, 944 F.Supp. at 466-67 (holding that a state "cannot satisfy the requirements of [Chapter 154] unless the state

Respondent argues that section 20 is a rule of court for the following reasons: (1) it is published in the appendix of a volume entitled "Court Rules"[30]; (2) in the legislative history of Chapter 154, California's unitary review procedure is referred to as a "rule of its supreme court," [31] therefore Congress intended standards such as section 20 to fall within the term "rule of court"; (3) California Government Code § 68070 authorizes "every court" in the state to "make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council"; (4) section 20 has been adopted by the Judicial Council and the California Supreme Court; and (5) standards of competency need not be a rule of court or statute

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imposes binding or mandatory standards of competency" as opposed to mere guidelines) (citing *Ashmus*, 935 F.Supp. at 1072). Given the importance of competent habeas representation, the Court will not deviate from its prior holding in this regard. Mandatory, it should also be noted, does not mean discretionless. It simply means that the competency standards must establish a clear and obligatory baseline of competence. In this sense, the requirement that competency standards be mandatory is but a subset of the requirement that standards be provided by rule of court or statute, i.e., provided by procedures which carry the force of law.

30. At oral argument respondent brandished the volume with its title "emblazoned" on the spine. *See* Resp. Supp. Mem. at 18. The Court declines respondent's invitation to draw legal conclusions from synecdotal association. To do so would require the Court to ignore explicit language throughout all three volumes of the "Court Rules" which carefully distinguishes rules, on the one hand, from standards, guidelines, policies, recommendations, practices and procedures, on the other. *See* Cal. Rules of Court, Introductory Statement, Court Rules, Vol. 23, pt.1 at 4 (West 1996) (describing standards as precatory and distinguishing them from rules of court which have the force of law); Introduction to Internal Operating Practices & Procedures, Court Rules, Vol. 23, pt.3 at 133 (West 1996) (distinguishing the IOPP from constitutional, statutory and decisional law as well as rules of court); Cal. Const. Article VI, section 6 (distinguishing Judicial Council's authority to "make recommendations" from its authority to "adopt rules").

31. 1991 Analysis, 137 Cong. Rec. at S3221.

so long as they are provided by a rule of court or statute. Resp. Supp. Mem. at 16-18.

As an initial matter, the Court notes that at the time section 20's competency standards were established (1985), capital counsel in California had no duty or funding to investigate or pursue habeas claims. Therefore, for all appellate counsel appointed prior to California becoming a unitary review state (i.e., prior to 1989 when the Policies were adopted), there was no evaluation for, let alone assurance of, competency for handling habeas claims. Thus section 20 did not "focus on and articulate standards of competence" for unitary review counsel and there was no mechanism to ensure competency. This alone violates Chapter 154's irreducible minimum. *See* 1991 Analysis, 137 Cong. Rec. at S3220 ("At a minimum, the immediate benefits to defendants would include the requirement that states ... focus on an[d] articulate standards of competence"), quoted in *Ashmus*, 935 F.Supp. at 1072.

Respondent nevertheless argues that Congress "plainly employed the term `rule of court' in a distinctly nontechnical sense, and certainly intended that the term would include standards like those specified in section 20 of the Standards of Judicial Administration." Resp. Supp. Mem. at 18. In support of this proposition Respondent cites part of the 1991 Analysis stating that "California, for example, has adopted a unitary review procedure for capital cases *by rule of its supreme court*." 1991 Analysis, 137 Cong. Rec. S3221 (emphasis added).

Respondent's argument is flawed in a number of respects. First, the reference in the 1991 Analysis is only to California's adoption of a unitary review procedure, it says nothing about competency standards or other qualifying procedures. Second, in the 1991 Analysis Congress merely refers to California as an example of a state with certain unitary review procedures in place. Congress expressed no opinion on the *adequacy* of those procedures, e.g., whether the 1989 Policies are a rule of court

within the meaning of § 2265(a). Indeed, after referring to the California example, the same section of the 1991 Analysis emphasizes that the proposed legislation would only "extend[ ] the application of [Chapter 154] to states with *adequate* unitary review procedures in capital cases." 137 Cong. Rec. S3222 (emphasis added).[32/] Finally, and perhaps most importantly, the Court needn't scour the legislative record to divine what Congress meant by requiring competency standards to be provided by "rule of court or statute" when the meaning of those terms is unambiguous. *See Demarest v. Manspeaker,* 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Congress required a statute or rule of court in section 2265(a). California explicitly distinguishes between its rules of court and its guidelines, policies, practices, recommendations, and standards. *See* note 30, *supra*. By its terms then, and by the terms of Chapter 154, section 20 is not a rule of court. Nothing in the legislative record alters this conclusion and respondent's insistence that "rule of court" be read in a "distinctly nontechnical sense" is unavailing.[33/]

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32. The only source this Court has found for the reference to California as an example of a unitary review state is the remarks of California's Attorney General, Daniel Lungren--a representative of the state with a strong interest in presenting the state's existing procedures as qualifying. See 137 Cong. Rec. at S8716 (arguing that California would not seek to opt in "[i]f the provisions of the final legislation are too onerous or are substantively inconsistent with present state law"); *id.* at S8717 n. 3 (citing the 1989 Policies as evidence of California's unitary review procedure). If the state attorney general is the only significant source, any conclusion that Congress believed state supreme court policies or standards could qualify as rules of court within the meaning of § 2265(a) must be discounted accordingly.

33. Even if one withholds inferences as to the reason behind the state's adoption of Rule of Court 76.6 this year, the new rule proves the marked difference between a mere standard recommending criteria for assessing competence and a rule of court setting forth mandatory standards. *See Montiel*, No. Civ. 96-5412 OWW at 15-16 ("If section 20(c) adequately

Respondent next invokes California Government Code § 68070(a) which provides that "[e]very court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." Cal. Gov't Code § 68070(a). Although respondent does not explicitly so argue, California courts have held that court policies can be enforceable as court rules, under section 68070(a), if the policies are published and if the parties affected are informed that the policies are requirements rather than mere guidelines. *See Shipp v. Superior Court*, 5 Cal.App.4th 147, 151, 6 Cal.Rptr.2d 685 (1992) (holding that a policy manual of procedures for the Family Law Department of the Los Angeles Superior Court is enforceable as a local rule); *City of El Monte v. Takei*, 158 Cal.App.3d 244, 247-48, 204 Cal.Rptr. 559 (1984) (Los Angeles Superior Court Civil Trial Manual is enforceable as general court rule).[34/] The line of cases creating this rule involve local court policies and the question whether counsel are bound to comply with them as local rules. *See id.* Respondent points to no case holding that section 20 is enforceable under section 68070 and no case holding that an internal standard governing court practices is enforceable *against the state supreme court*. Most compellingly though,

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governed capital case competency standards there was no need for Rule 76.6.").

34. Both of these decisions rely on the following reasoning from *Wisniewski v. Clary*:

> [I]t seems clear to us that courts which may make local rules may also make local policies--a lower and less permanent form of specification of the practices to be followed in the particular court. So long as those to be governed by the local policies are fully and fairly informed of their requirements in advance and particularly of the fact (*when such is the fact*) that these policies represent *requirements* rather than mere guidelines, we regard them as being fully enforceable generally as court rules.

46 Cal.App.3d 499, 504-05, 120 Cal.Rptr. 176 (1975) (holding that local policy requiring presence of parties at a mandatory settlement conference is enforceable as a court rule) (emphasis added).

there is no evidence that section 20 derives from the state supreme court's power under section 68070. On the contrary, section 20 is set forth in Division I of the Appendix to California Rules of Court, entitled "Standards of Judicial Administration Recommended by the Judicial Council." Rather than assume that the standards set forth in section 20 are what they claim to be--namely, guidelines recommended by the Judicial Council according to its authority under Article VI, section 6, of the California Constitution--respondent would apparently have the Court conclude that section 20 actually derives from section 68070 and thereby has the force of a rule according to cases interpreting that provision for other purposes. The Court is not persuaded.

Even when forced to concede that section 20 is a mere recommendation rather than a statute or rule of court, respondent contends that section 20 is nevertheless a qualifying competency procedure because it has been "adopted" by the Judicial Council and the Supreme Court. Resp. Supp. Mem at 16-17. That the Judicial Council has adopted section 20 proves too much though. In the Introductory Statement to the Rules of Court the Judicial Council does indeed announce that it has adopted all of the "Standards of Judicial Administration." But the Introductory Statement specifically differentiates between rules of court which "have the force of law," and standards such as section 20, which are described as "nonmandatory ... recommendations on practice and procedure [expressing] goals that courts and judges are urged to try to attain, and stat[ing] guidelines for discretionary action." Court Rules, Vol. 23, pt.1 at 4 (West 1996). The Introductory Statement also indicates that the Standards of Judicial Administration are adopted "[u]nder ... `authority granted by article VI, section 6, of the Constitution to `*make recommendations* to the courts.'" *Id.* The rules of court, by contrast, are adopted under authority granted by the same constitutional provision "*to `adopt rules* for court administration, practice and procedure not inconsistent with statute' ...." *Id.* Thus, the Judicial Council's

adoption of the Standards of Judicial Administration simply confirms that section 20 is not a rule of court.

The only novel support provided for respondent's claim that the Supreme Court has adopted section 20 as a rule of court is evidence that, in practice, the Supreme Court uses section 20 as the "initial measure of the experience and qualifications of private attorneys applying for appointment to a capital appeal." Resp. Supp. Mem. at 16-17 (quoting Appellate Indigent Defense Oversight Adversary Committee, Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program 6 (February 1997); also citing a March 3, 1994 form letter from the California Supreme Court referring to section 20 as "containing the guidelines for the appointment of appellate counsel"). However, the sources cited merely establish that section 20 has been used as a "guideline" since 1994. *See id.* In any event, the state supreme court's reliance on section 20 in practice does not raise section 20 to the status of a qualifying procedure. Courts have regularly held that compliance in practice is not sufficient to meet the requirements of Chapter 154. *See* note 23, *supra.*

The final new argument raised by respondent is that standards of competency need not actually *be* a rule of court or statute so long as they are *provided by* a rule of court or statute. Respondent claims:

> [W]hile section 20 contains the actual *specification* of California's standards, their existence is most certainly "provided" by California Rule of Court 76.5, wherein they are cross-referenced, and California Government Code section 68511.5 (which certainly qualifies as a "statute").

Resp. Supp. Mem. at 17 (emphasis original). This argument flies in the face of the plain language of section 2265(a). In a single, simple sentence the statute commands that "[t]he rule of court or statute must provide standards of competency for the appointment of counsel." 28 U.S.C. § 2265(a). The direct

implication is that a state's statute or rule of court setting forth a qualifying mechanism for appointment, compensation and payment would also set forth standards of competence. If the use of singular is ignored ("*The* rule of court or statute"), Chapter 154 arguably permits standards of competence to be set forth in a separate statute or rule of court from other qualifying mechanisms. Either way, the requirement of a procedure established with the force of law is inescapable. Instead of taking the sentence in section 2265(a) for what it means, respondent would have the Court conclude that section 20 qualifies as a rule because Rule 76.5 requires appellate courts to "consider the guidelines in section 20." But a mandate to "consider" nonmandatory recommendations is not a rule of court. It provides no requirement that counsel be appointed according to standards that ensure competent representation.

Under the foregoing circumstances, the Court remains confident that, at least until this year, California had no qualifying mechanism in place for ensuring competent unitary review counsel.

III. CONCLUSION

Accordingly, and good cause appearing, the Court hereby ORDERS that Chapter 154 SHALL NOT APPLY to these proceedings.

IT IS SO ORDERED.

DATED/s/12/24/98 /s/Thelton E. Henderson
THELTON E. HENDERSON,
UNITED STATES DISTRICT COURT

APPENDIX E

1. UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL
PROCEDURE PART VI--PARTICULAR
PROCEEDINGS
CHAPTER 154--SPECIAL HABEAS CORPUS
PROCEDURES IN CAPITAL CASES

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

2. UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL
PROCEDURE PART VI--PARTICULAR
PROCEEDINGS CHAPTER 154--SPECIAL HABEAS
CORPUS PROCEDURES IN CAPITAL CASES

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be

understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

3. WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2. THE JUDICIAL COUNCIL
ARTICLE 1. GENERAL PROVISIONS

§ 68511.5. Selection of appointed counsel to handle criminal appeals by indigent defendants

Not later than January 1, 1985, the Judicial Council shall adopt rules of court regulating the selection of appointed counsel, other than the State Public Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts. In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office of the State Public Defender.

4. WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES
RELATING TO THE SUPREME COURT AND
COURTS OF APPEAL
CHAPTER IV. ADMINISTRATIVE PROVISIONS
GOVERNING REVIEWING COURTS

Rule 76.5. Appointment of counsel in criminal appeals

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in

section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

5. WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
APPENDIX TO CALIFORNIA RULES OF COURT
DIVISION I. STANDARDS OF JUDICIAL
ADMINISTRATION RECOMMENDED BY THE
JUDICIAL COUNCIL

§ 20. Guidelines for appointment of counsel in criminal appeals

(a) [General] Each appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5, should follow the guidelines in this section to match each appointed attorney's skills and experience with the demands of the case. Before appointment of counsel in a case, the court should determine the demands of the case by reviewing the trial court file or by other appropriate means. In determining the demands of the case, the following factors should be considered: the length of the sentence; the novelty or complexity of the issues; the length of the trial and of the reporter's transcript; and any questions relating to the competency of trial counsel.

(b) [Courts of Appeal] Each Court of Appeal should maintain three lists of qualified attorneys. The lists should be based on the following minimum qualifications:

List I (For appointment to cases in which probation was granted, or the sentence is five years or less in state prison): (1) active membership in the state bar; (2) attendance at one approved appellate training program; (3) participation in one trial or appellate brief; and (4) submission of one sample of the attorney's writing for review by the court or administrator.

List II (For appointment to cases in which the sentence is five years to fifteen years in state prison): (1) active practice of law for 18 months in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of two appellate cases; and (4)

submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

List III (For appointment to cases in which the sentence is fifteen years to life in state prison): (1) active practice of law for three years in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of five appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

(c) [Supreme Court] The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

6. WEST'S ANNOTATED CALIFORNIA CODES CALIFORNIA SUPREME COURT SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

Policy

1. Stays of execution.
2. Withdrawal of counsel.
3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions.

Adopted by the Supreme Court Effective June 6, 1989

Policy 1. Stays of Execution

The Court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

Policy 2. Withdrawal of counsel

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and wiling to accept appointment for appropriate postappeal representation related to the case.

Policy 3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii)

providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became

aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1 [220 Cal.Rptr. 382, 384, fn. 1, 708 P.2d 1260, 1262, fn. 1]), the petition was filed within a reasonable time after that date.

1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of habeas corpus petitions and other ancillary pleadings in the California Supreme Court; (iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court and, if certiorari is granted, preparation and filing of a brief or briefs on the merits and preparation and presentation of oral argument; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California

or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for authorization to incur, and reimbursement of, investigation expenses shall be governed by the following standards:

2-2.1. Without prior authorization of the court, counsel may incur expenses up to a total of $3,000 for habeas corpus investigation, and may submit claims to the court for reimbursement up to that amount. The court will reimburse counsel for expenses up to $3,000 that were reasonably incurred.

2-2.2. If after incurring $3,000 in expenses, counsel determines it is necessary to incur additional expenses for which he or she plans to seek reimbursement from the court, counsel must seek and obtain prior authorization from the court. As a general rule, the court will **not** reimburse counsel for expenses exceeding $3,000, without prior authorization of the court. Requests by appointed counsel for prior authorization to incur investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, counsel shall file with this court a "Confidential request for authorization to incur expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for authorization to incur expenses shall set out:

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. (a) An itemized listing of all expenses previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

2-5. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

2-6. When a petition is pending in this court to exhaust claims presented in a federal habeas corpus petition, a request by counsel for investigative funds to bolster or augment claims already presented in the petition normally will be denied absent a showing of strong justification for the request. A request for investigative funds may be granted if the petitioner demonstrates that he or she has timely discovered new and potentially meritorious areas of investigation not previously addressed in the petitioner's federal or state petitions. This has been the internal operating policy of the court since December 16, 1992.

2-7. Each request for fees relating to a habeas corpus petition must be accompanied by: (a) An itemized listing of all fees previously sought from, and/or approved by any court of

this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

7. WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND
GOVERNMENT OF COURTS
CHAPTER 2. THE JUDICIAL COUNCIL
ARTICLE 1. GENERAL PROVISIONS

§ 68070. Rules of court; authority to make; restrictions; uniformity

(a) Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council. These rules shall not:

(1) Impose any tax, charge, or penalty upon any legal proceeding, or for filing any pleading allowed by law.

(2) Give any allowance to any officer for services.

(b) The Judicial Council shall adopt rules or procedures to encourage uniformity of requirements throughout a court and statewide. The subjects on which uniformity should be sought shall include, but are not limited to, (1) the form of papers, (2) limitations on the filing of papers, (3) rules relating to law and motion, and (4) requirements concerning documents to be filed at or prior to trial."

APPENDIX F

COMPETENCY STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL COLLATERAL PROCEEDINGS

UNITED STATES JURISDICTIONS

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1. FEDERAL

21 U.S.C. § 848(q) reads in relevant part as follows:

§ 848. Continuing criminal enterprise

* * * * *

(q) Appeal in capital cases; counsel for financially unable defendants

* * * * *

(4)(A) * * *

(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have

had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

* * * * *

2. ARIZONA

a. Ariz. Rev. Stat. § 13-4041 reads in relevant part as follows:

§ 13-4041. Fee of counsel assigned in criminal proceeding or insanity hearing on appeal or in post-conviction relief proceedings; reimbursement; definitions

* * * * *

B. After the supreme court has affirmed a defendant's conviction and sentence in a capital case, the supreme court, or if authorized by the supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state post-conviction relief proceeding. Counsel shall meet the following qualifications:

1. Membership in good standing of the state bar of Arizona for at least five years immediately preceding the appointment.

2. Practice in the area of state criminal appeals or post-conviction proceedings for at least three years immediately preceding the appointment.

3. No previous representation of the capital defendant in the case either in the trial court or in the direct appeal, unless the defendant and counsel expressly request continued repre-

sentation and waive all potential issues that are foreclosed by continued representation.

C. The supreme court shall establish and maintain a list of qualified candidates. In addition to the qualifications prescribed in subsection B of this section, the supreme court may establish by rule more stringent standards of competency for the appointment of post-conviction counsel in capital cases. The supreme court may refuse to certify an attorney on the list who meets the qualifications established under subsection B of this section or may remove an attorney from the list who meets the qualifications established under subsection B of this section if the supreme court determines that the attorney is incapable or unable to adequately represent a capital defendant. The court shall appoint counsel pursuant to subsection B of this section from the list.

D. Notwithstanding subsection C of this section, the court may appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:

1. No counsel meets the qualifications under subsections B and C of this section.

2. No qualified counsel is available to serve.

* * * * *

b. Ariz. R. Crim. P. 6.8 reads in relevant part as follows:

Rule 6.8. Standards for Appointment of Counsel in Capital Cases

a. **General.** To be eligible for appointment in a capital case, an attorney

(1) Shall have been a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;

(2) Shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and

(3) Shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

* * * * *

c. **Appellate and Post-Conviction Counsel.** To be eligible for appointment as appellate or post-conviction counsel, an attorney must meet the qualifications set forth in section (a) of this rule and the following:

(1) Within three years immediately preceding the appointment have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, an attorney must have been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings.

(2) Have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.

d. **Exceptional Circumstances**. In exceptional circumstances and with the consent of the Supreme Court, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1) and (2), (b) and (c) of this rule, providing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in this rule and that the attorney associates with himself or herself a lawyer who does meet the standards set forth in this rule.

3. ARKANSAS

Ark. R. Crim P. 37.5 reads in relevant part as follows:

RULE 37.5. SPECIAL RULE FOR PERSONS UNDER SENTENCE OF DEATH

(a) Purpose and Scope. This rule shall apply only to persons under a sentence of death. Except as otherwise provided in this rule, the provisions of Rules 37.1, 37.2, 37.3 and 37.4 shall apply to a petition for post-conviction relief filed by a person under sentence of death. The intent of this rule is to comply with the provisions of 28 United States Code § 2261 et seq.

(b) Requirement of Hearing on Appointment of Attorney.

* * * * *

(c) Qualifications of Appointed Attorney

(1) Except as provided in subsection (c)(4) of this rule, an attorney appointed to represent a person under this rule shall meet each of the following standards:

(A) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or

(ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought; and

(B) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner in at least three state or federal post- conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or

(ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceeding; and

(C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and

(D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.

(2) The circuit court may appoint pro hac vice an attorney who is not licensed to practice in Arkansas but who meets the standards of (c)(1) provided the court also appoints as co-counsel an attorney who is licensed to practice in Arkansas. In such case, the attorney who is licensed to practice in Arkansas is not required to meet the standards of (c)(1).

(3) The court shall make findings, either on the record or in the written order required by subsection (b) of this rule, specifying the qualifications of counsel which satisfy the standards for appointment under this rule.

(4) The circuit court may appoint an attorney who does not meet the standards of (c)(1)(A) and (c)(1)(B), but who does meet the standards of (c)(1)(C) and either (c)(1)(A), (B), or (D), if the circuit court determines that the attorney is clearly qualified because of his unique training, experience, and background to represent a person under sentence of death in a post-conviction proceeding. The order appointing such an attorney shall contain written findings specifying the unique training, experience, and background that qualify the attorney for appointment.

(5) The circuit court shall not appoint an attorney under this rule if the attorney represented the person under a sentence of death at trial or on direct appeal to the Supreme Court of Arkansas unless the person and the attorney request continued

representation on the record. If the circuit court does appoint an attorney who represented the person at trial or on direct appeal, the circuit court shall appoint a second attorney, who did not represent the person at trial or on direct appeal, to assist in the representation of the person. At least one of the attorneys shall meet the standards of (c)(1) or (c)(4).

(6) In accordance with the terms of this rule, the circuit court may appoint the Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission, unless otherwise disqualified.

* * * * *

4. CALIFORNIA

Cal. R. of Ct. 76.6 reads in relevant part as follows:

* * * * *

(e) [Qualifications for appointed habeas corpus counsel] An attorney appointed to represent a person in the Supreme Court in death penalty related habeas corpus proceedings, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder, and counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Counsel of record for a defendant in five completed felony appeals or writ proceedings and supervised counsel in two Supreme Court death penalty related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a Supreme Court death penalty related habeas corpus proceeding shall apply toward the minimum qualifications described in this

subdivision (e)(2)(B) only if lead or associate counsel in that proceeding attests that the attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty habeas corpus proceedings;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which involve death penalty habeas corpus proceedings. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration:

(A) Three writing samples, ordinarily two appellate briefs and one habeas corpus petition, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) [Alternative qualifications] The Supreme Court may appoint an attorney who does not meet the requirements of subdivisions (d)(1) and (d)(2) or (e)(1) and (e)(2) of this rule if

the attorney has the qualifications described in subdivisions (d)(3) through (d)(5) or (e)(3) through (e)(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, such that the attorney has substantially equivalent experience in complex cases as an attorney qualified under subdivision (d) or (e);

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court; and

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court shall determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of his or her individual background and experience. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement.

(g) [Attorneys without trial experience] If an attorney appointed under either subdivision (e) or subdivision (f) to represent a defendant in death penalty related habeas corpus proceedings in the Supreme Court does not have experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience if an evidentiary hearing is ordered in the habeas corpus proceeding.

(h) [Use of supervised counsel] An attorney who does not meet the qualifications described in subdivisions (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) [Dual appointment] An attorney appointed to represent a defendant in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court must meet the minimum qualifications of both subdivisions (d) and (e), or of subdivision (f). Notwithstanding the foregoing, two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both subdivisions (d) and (e), or of subdivision (f).

(j) [Designated entities as appointed counsel] Notwithstanding any other provision of this rule, the State Public Defender is qualified and eligible to serve as appointed counsel in death penalty appeals, the California Habeas Resource Center is qualified and eligible to serve as appointed counsel in death penalty related habeas corpus proceedings in the Supreme Court, and the California Appellate Project is qualified and eligible to serve as appointed counsel in both classes of proceedings. When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project shall not assign any attorney as lead counsel in the appeal unless it finds the attorney has the qualifications described in subdivisions (d)(1) through (d)(5) or the Supreme Court finds the attorney to qualify under subdivision (f). When serving as appointed counsel in a death penalty related habeas corpus proceeding in the Supreme Court, the California Habeas Resource Center or the California Appellate Project shall not assign any attorney as lead counsel in the proceeding unless it finds the attorney has the qualifications described in subdivisions (e)(1) through (e)(5) or the Supreme Court finds the attorney to qualify under subdivision (f).

(k) [Attorney appointed by federal court] Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the

Supreme Court finds the attorney has the commitment, proficiency and knowledge necessary to represent the defendant competently in state proceedings.

5. COLORADO

Colo. Rev. Stat. § 16-12-205 reads in relevant part as follows:

§ 16-12-205. Postconviction review--appointment of new postconviction counsel--qualifications--compensation

(1) At the hearing held pursuant to section 16-12-204(2), if the defendant chooses to pursue postconviction review, the trial court shall enter an order appointing new postconviction counsel for the defendant if the trial court finds that the defendant is indigent and either the defendant requests and accepts such appointment or the trial court finds that the defendant is unable to competently decide whether to accept or reject the appointment. * * * * *

(2) In appointing new postconviction counsel to represent an indigent defendant, the trial court shall appoint one or more attorneys who, alone or in combination, meet all of the following minimum qualifications:

(a) Each appointed attorney shall be licensed to practice law in Colorado or be admitted to practice in Colorado solely for the purpose of representing the defendant;

(b) At least one of the appointed attorneys shall have a minimum of five years' experience in criminal law litigation, including work on trials and postconviction proceedings;

(c) At least one of the appointed attorneys shall have a minimum of three years' experience in trying felony cases, including having tried at least five felony cases to verdict in the preceding five years or having tried a minimum total of twenty-five felony cases; and

(d) At least one of the appointed attorneys shall have a minimum of three years' experience in handling appeals of felony cases, having served as counsel in at least five appeals in felony cases.

(3) In appointing new postconviction counsel, the trial court may also consider the following factors:

(a) Whether the attorney under consideration has previously appeared as counsel in a class 1 felony case in which the death penalty was sought;

(b) Whether the attorney under consideration has tried at least one first degree murder case to verdict;

(c) Whether, within the preceding five years, the attorney under consideration has taught or attended a continuing legal education course that dealt in substantial part with the trial, appeal, and postconviction review of class 1 felony cases in which the death penalty is sought;

(d) The workload of the attorney under consideration and how that workload would affect the attorney's representation of the defendant;

(e) The diligence and ability of the attorney under consideration; and

(f) Any other factor that may be relevant to a determination of whether the attorney under consideration will fairly, efficiently, and effectively represent the defendant for purposes of postconviction review.

* * * * *

6. FLORIDA

a. Fla. Stat. ch. 27.710 reads as follows:

27.710. Registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court

(1) The executive director of the Commission on Capital Cases shall compile and maintain a statewide registry of

attorneys in private practice who have certified that they meet the minimum requirements of § 27.704(2) and who are available for appointment by the court under this section to represent persons convicted and sentenced to death in this state in postconviction capital collateral proceedings. To ensure that sufficient attorneys are available for appointment by the court, when the number of attorneys on the registry falls below 50, the executive director shall notify the chief judge of each circuit by letter and request the chief judge to promptly submit the names of at least three private attorneys who regularly practice criminal law in that circuit and who appear to meet the minimum requirements to represent persons in postconviction capital collateral proceedings. The executive director shall send an application to each attorney identified by the chief judge so that the attorney may register for appointment as counsel in postconviction capital collateral proceedings. As necessary, the executive director may also advertise in legal publications and other appropriate media for qualified attorneys interested in registering for appointment as counsel in postconviction capital collateral proceedings. Not later than September 1 of each year, and as necessary thereafter, the executive director shall provide to the Chief Justice of the Supreme Court, the chief judge and state attorney in each judicial circuit, and the Attorney General a current copy of its registry of attorneys who are available for appointment as counsel in postconviction capital collateral proceedings. The registry must be indexed by judicial circuit and must contain the requisite information submitted by the applicants in accordance with this section.

(2) To be eligible for court appointment as counsel in postconviction capital collateral proceedings, an attorney must certify on an application provided by the executive director that he or she satisfies the minimum requirements for private counsel set forth in § 27.704(2).

(3) An attorney who applies for registration and court appointment as counsel in postconviction capital collateral proceedings must certify that he or she is counsel of record in not more than four such proceedings and, if appointed to

represent a person in postconviction capital collateral proceedings, shall continue such representation under the terms and conditions set forth in § 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court. The court may not permit an attorney to withdraw from representation without a finding of sufficient good cause. The court may impose appropriate sanctions if it finds that an attorney has shown bad faith with respect to continuing to represent a defendant in a postconviction capital collateral proceeding. This section does not preclude the court from reassigning a case to a capital collateral regional counsel following discontinuation of representation if a conflict of interest no longer exists with respect to the case.

* * * * *

b. Fla. Stat. ch. 27.704 reads as follows:

27.704. Appointment of assistants and other staff

Each capital collateral regional counsel may:
(1) Appoint, employ, and establish, in such numbers as he or she determines, full-time or part-time assistant counsel, investigators, and other clerical and support personnel who shall be paid from funds appropriated for that purpose. A full-time assistant capital collateral counsel must be a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings. Law school graduates who do not have the qualifications of a full-time assistant capital collateral counsel may be employed as members of the legal staff but may not be designated as sole counsel for any person.

(2) Contract with private counsel who are members in good standing of The Florida Bar or with public defenders for the purpose of providing prompt and cost-effective representation for individuals who are sentenced to death in this state. A private counsel or public defender under contract with the regional counsel must have at least 3 years' experience in the practice of criminal law, and, prior to the contract, must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings.
(3) Appoint pro bono assistant counsel, who must be members in good standing of The Florida Bar, and who shall serve without compensation at the discretion of the capital collateral regional counsel.

7. IDAHO

Idaho Crim. R. 44.3 (effective September 15, 2000) reads in relevant part as follows:

RULE 44.3 STANDARDS FOR THE QUALIFICATION OF APPOINTED COUNSEL IN CAPITAL CASES

* * * * *

3. Attorney Qualifications.

(a) Trial.

(1) Lead trial counsel assignments shall be made to attorneys who:

(A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and

(B) Are experienced and active trial practitioners with at least five (5) years litigation experience in criminal defense or prosecution; and

(C) Have served as lead counsel in no fewer than four (4) felony jury trials of cases which were tried to completion; and have served either as lead or co-counsel in one case in which the death penalty might have been

imposed and which was tried through to completion, or served as lead counsel in the sentencing phase of a death penalty case.

(D) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and

(E) Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

(F) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years; and

(G) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(2) Co-counsel assignments shall be assigned to attorneys who:

(A) Are members in good standing of the Idaho State Bar, admitted to practice in Idaho or admitted to practice pro hac vice; and

(B) Qualify as lead counsel under paragraph 3 (a) of this Order or meet the following requirements:

(i) Are experienced and active trial practitioners with at least three (3) years litigation experience in criminal defense or prosecution; and

(ii) Have prior experience as lead counsel in no fewer than three (3) felony jury trials of cases which were tried to completion; and

(iii) Are familiar with the rules, practice and procedure of the district courts of the state of Idaho; and

(iv) Have attended and successfully completed at least six (6) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two years; and

(v) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(3) Alternate Procedures.
Applications for lead and co-counsel assignments may be made by persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the Idaho Supreme Court or the Court's designee that competent representation will be provided in a capital case. Lawyers appointed under this paragraph shall meet the following qualifications:

(A) Experience in some stage of death penalty litigation which does not meet the levels required in paragraphs (a) or (b) above;

(B) Specialized in post-graduate training in the defense or prosecution of persons accused of capital crimes; or

(C) The availability of ongoing consultation support from experienced death penalty counsel.

(b) Appeal/Post-Conviction.

(1) Appellate or post convictions counsel must either qualify as "lead trial counsel" under Section 3 (a) or meet the following requirements:

(A) Be a member in good standing of the Idaho State Bar, be admitted to practice in Idaho or admitted to practice pro hac vice.

(B) Be familiar with the rules, practice and procedure of the appellate courts of the State of Idaho.

(C) Be experienced and active post-conviction and appellate practitioners with at least three (3) years experience in criminal defense or prosecution.

(D) Have served as court appointed or retained counsel in the appeal or the post conviction review of a case in which the death penalty was imposed, or have served as counsel in a habeas corpus death penalty case in Federal Court.

(E) Have attended and successfully completed at least twelve (12) hours of Idaho State Bar approved training or educational programs which focus on capital cases, within the last two (2) years.

(F) Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

If the court in its discretion appoints co-counsel for appeal or post conviction, these requirements do not apply to co-counsel.

(2) Alternate Procedures.

Application for lead and co-counsel assignments may be made by persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the Idaho Supreme Court or the Court's designee that competent representation will be provided in a capital case. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

(A) Experience with the appeal and/or post-conviction litigation of death penalty cases which does not meet the levels detailed in paragraphs (a) or (b) above; and

(B) Specialized in post-graduate training in the defense or prosecution of persons accused of capital crimes;

(C) The availability of ongoing consultation support from experienced death penalty counsel.

* * * * *

8. KANSAS

a. Kan. Stat. Ann. § 22-4503 reads in relevant part as follows:

22-4503. Entitlement of defendant to counsel; appointment of counsel, when; access to defendant; duty of appointed counsel.

(a) A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant and a defendant in an

extradition proceeding, or a habeas corpus proceeding pursuant to K.S.A. 22- 2710 and amendments thereto, is entitled to have assistance of counsel at such proceeding. A person subject to an order or commitment pursuant to K.S.A. 22-3428 or K.S.A. 1998 Supp. 59-2965 and amendments thereto, shall be entitled to the assistance of counsel at every stage of a habeas corpus proceeding brought by such person and the provisions of this section relating to defendants shall be applicable to such persons.

* * * * *

(c) If it is determined that the defendant is not able to employ counsel, as provided in K.S.A. 22-4504 and amendments thereto, the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services for the county or judicial district. * * * *

* * * * *

b. Kan. Stat. Ann. § 22-4504 reads in relevant part as follows:

22-4504. Same; determination of indigency; partial indigency, effect; disposition of payments for appointed counsel services.

(a) When any defendant who is entitled to have the assistance of counsel, under the provisions of K.S.A. 22-4503 and amendments thereto, claims to be financially unable to employ counsel, the court shall require that the defendant file an affidavit containing such information and in the form as prescribed by rules and regulations adopted by the state board of indigents' defense services. * * * * *

(b) Upon the basis of the defendant's affidavit, the defendant's statements under oath, and such other competent evidence as may be brought to the attention of the court, which

shall be made part of the record in the case, the court shall determine whether the defendant is financially unable to employ counsel. * * * * * If the defendant's assets and income are not sufficient to cover the anticipated cost of effective representation by employed counsel when the length and complexity of the anticipated proceedings are taken fully into account, the defendant shall be determined indigent in full or in part and the court shall appoint an attorney as provided in K.S.A. 22-4503 and amendments thereto. * * * * *

c. Kan. Stat. Ann. § 22-4506 reads in relevant part as follows:

22-4506. Persons in custody after felony conviction; habeas corpus or 60- 1507 motions; capital murder cases; appointment of counsel; assignment, standards and compensation.

* * * * *

(d) (1) The state board of indigents' defense services shall provide by rule and regulation for: (A) The assignment of attorneys to the panel for indigents' defense services to represent indigent persons, who have been convicted of capital murder and are under sentence of death, upon a filing of a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507 and amendments thereto;

(B) standards of competency and qualification for the appointment of counsel in capital cases under this section; and

(C) the reasonable compensation of counsel appointed to represent individuals convicted of capital murder and under a sentence of death, during proceedings conducted pursuant to subsection (a), (b) or (c) and for reasonable and necessary litigation expense associated with such proceedings.

(2) If a petitioner or movant, who has been convicted of capital murder and is under a sentence of death, files a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507 and amendments thereto, the district court shall make a determination on the record whether the petitioner or

movant is indigent. Upon a finding that the petitioner or movant is indigent and accepts the offer of representation or is unable competently to decide whether to accept or reject the offer, the court shall appoint one or more counsel, in accordance with subsection (d) (1), to represent the petitioner or movant. * * * * * *

* * * * * * *

d. Kan. Admin. Regs. 105-3-12 reads as follows:

105-3-12 Appointments in capital cases.

(a) In each case in which the death penalty may be imposed and the defendant is unable to afford counsel, the court shall appoint counsel to represent the defendant in accordance with the system established by the board for providing legal defense services for indigent persons charged with capital felonies. Subject to K.A.R. 105-5-4, the court may appoint co-counsel from the capital appointments panel list to represent the defendant in accordance with the system established by these regulations for providing legal defense services for indigent persons charged with capital felonies. Entitlement to Legal Representation

(1) The court shall not appoint any attorney to provide representation in a capital felony without prior notice to the capital coordinator.

(2) Eligibility to serve on the capital appointments panel shall be limited to attorneys who have been screened pursuant to K.A.R. 105-3-2(a)(5).

(b) The court shall appoint counsel for any indigent person accused of homicide pursuant to K.S.A. 21-3401, 21-3402 or 21-3403 from panel lists approved by the capital coordinator. The court shall not appoint any attorney to provide representation to an indigent person accused of a felony pursuant to K.S.A. 21-3401, 21-3402 or 21-3403 without prior notice to the capital coordinator.

(c) Appeals. The court shall appoint the state appellate defender to represent an indigent defendant in each appeal of a capital felony conviction in accordance with K.A.R. 105-10-2.

e. Kan. Admin. Regs. 105-3-2 reads in relevant part as follows:

105-3-2 Eligibility to serve.

(a) Each licensed attorney engaged in private practice of law shall be eligible to serve on the panel if the following criteria are met:

* * * * *

(5) Each attorney assigned or appointed to the defense of any indigent person accused of a capital felony shall be a prequalified death penalty attorney. The capital coordinator shall screen each attorney to determine the attorney's qualifications to serve as defense counsel to an indigent person accused of a capital felony, pursuant to these regulations and "Guideline 5.1, Attorney Eligibility," as published in the February 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" and shall certify each attorney who is eligible to serve on the capital appointments panel.

(6) To ensure compliance with these regulations in homicide cases, each attorney assigned or appointed to the defense of any indigent person accused of a capital felony or a homicide pursuant to K.S.A. 21-3401, 21-3402 or 21-3403 shall be appointed from panel lists screened pursuant to these regulations and approved by the capital coordinator.

(b) Except for appointment of an attorney to provide representation for an indigent person accused of a capital felony or a homicide pursuant to K.S.A. 21-3401, 21-3402 or 21-3403, the judge may waive any of the above conditions if the attorney selected by the judge has sufficient training, resources and experience to undertake the case in question.

f. "Guideline 5.1, Attorney Eligibility," as published in the February 1989 version of the American Bar Association (ABA) "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" reads as follows:

GUIDELINE 5.1 ATTORNEY ELIGIBILITY

The appointing authority should distribute assignments in capital cases to attorneys who qualify under either of the alternative procedures detailed below in paragraphs I. TRIAL, II. APPEAL, and III. POSTCONVICTION.

I. TRIAL

A. Lead trial counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to pro hac vice; and

ii. are experienced and active trial practitioners with at least five years litigation experience in the field of criminal defenses; and

iii. have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials; and

iv. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

v. are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and

vi. have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought; and

vii. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Trial co-counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. who qualify as lead counsel under paragraph(s) of this Guideline or meet the following requirements:

a. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defenses; and

b. have prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which are trials in which the charge was murder or aggravated murder or alternatively, of the three jury trials, at least one was a murder or aggravated murder trial and one was a felony jury trial; and

c. are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

d. have completed within one year of their appointment at least one training or educational program on criminal advocacy

which focused on the trial of cases in which the death penalty is sought; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial experience or extensive civil litigation experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

II. APPEAL

A. Lead appellate counsel assignments should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. are experienced and active trial or appellate practitioners with at least three years experience in the field of criminal defense; and

iii. have prior experience within the last three years as lead counsel or co-counsel in the appeal of at least one case where a sentence of death was imposed, as well as prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of murder or aggravated murder conviction; or alternatively, have prior experience within the last three years as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder or aggravated murder convictions; and

iv. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the appeal of cases in which a sentence of death was imposed; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

B. Appellate co-counsel assignments may be distributed to attorneys who have less experience than attorneys who qualify as lead appellate counsel. At a minimum, however, appellate co-counsel candidates must demonstrate to the satisfaction of the appointing authority that they:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and

iii. are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

iv. have attended and successfully completed within two years of their appointment a training or educational program on criminal appellate advocacy.

C. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial and/or appellate experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in the trial and/or appeal of death penalty cases which does not meet the levels detailed in paragraphs A or B above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

III. POSTCONVICTION

A. Assignments to represent indigents in postconviction proceedings in capital cases should be distributed to attorneys who:

i. are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

ii. are experienced and active trial practitioners with at least three years litigation experience in the field of criminal defenses; and

iii. have prior experience as counsel in no fewer than five jury or bench trials of serious and complex cases which were tried to completion, as well as prior experience as postconviction counsel in at least three cases in state or federal court. In addition, of the five jury or bench trials which were tried to completion, the attorney should have been counsel in at least three cases in which the charge was murder or aggravated murders or alternatively, of the five trials, at least one was a murder or aggravated murder trial and an additional three were felony jury trials; and

iv. are familiar with the practice and procedure of the appropriate courts of the jurisdiction; and

v. have attended and successfully completed, within one year prior to their appointment, a training or educational program on criminal advocacy which focused on the postconviction phase of a criminal case, or alternatively, a program which focused on the trial of cases in which the death penalty is sought; and

vi. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

In addition to the experience level detailed above, it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level described in 11.B. above (relating to appellate co-counsel).

B. Alternate Procedures: Appointments for lead and co-counsel assignments may also be distributed to persons with extensive criminal trial, appellate and/or postconviction experience or extensive civil litigation and/or appellate experience, if it is clearly demonstrated to the appointing authority that competent representation will be provided to the capitally charged indigent defendant. Lawyers appointed under this paragraph shall meet one or more of the following qualifications:

i. Experience in trial, appeal and/or postconviction representation in death penalty cases which does not meet the levels detailed in paragraph A above;

ii. Specialized post-graduate training in the defense of persons accused of capital crimes;

iii. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys (see Guideline 3.1) to ensure that they will provide competent representation.

Commentary:

Eligibility requirements for capital counsel are aimed at providing highly qualified and dedicated attorneys to defendants who face the most serious of consequences -death. Consequently, the appointing authority should adopt eligibility standards which reflect at least seven essential quality control

criteria necessary for the selection of able counsel at all levels in capital cases:

i. license or permission to practice in the jurisdiction;

ii. general background in criminal defense work;

iii. demonstrated experience in felony practice at the appropriate level (trial, appeals, postconviction);

iv. demonstrated experience in death penalty litigations;

v. familiarity with the requisite court system(s);

vi. significant and continuous training in death penalty litigation; and

vii. demonstrated proficiency and commitment to quality representation.

Additionally, eligibility standards should require trial counsel to have demonstrated experience with expert witnesses and evidence. Drafters of local eligibility standards are encouraged to consider additional criteria which will enhance the quality of representation provided. See Guideline 11.1 et seq. and accompanying commentary. Once the standards have been developed, the objective of effective representation requires consistent and continuous application of the quality control criteria in order to ensure that defendants facing the prospect of death are not receiving inadequate representation.

The importance of distributing assignments to experienced attorneys possessing a substantial background in criminal defense practice has been previously noted. See commentaries to Guidelines 1.1, 2.1, and to the performance Guidelines in section 11. As in all criminal cases, it is elemental that assigned counsel be familiar with the practice and procedure of the courts where the client's case will be heard. 1

As discussed in Guidelines 1.1, 11.4.1, 11.7.2 and 11.8, verdicts and sentencing decisions in capital cases often turn upon the submission by both the prosecution and defense of evidence from expert witnesses. Eligible trial attorneys should therefore be adept at using expert evidence to the advantage of the client, and at cross-examining prosecution witnesses.

All assigned counsel should be required to receive relevant training on a periodic basis in order to enhance their advocacy skills; the changing nature of capital jurisprudence 2 requires capital counsel to keep abreast of constantly changing legal developments relating to death penalty matters. At all levels of capital representation, counsel should have the necessary skill and knowledge to provide quality representation.

This Guideline recognizes that fulfillment of the experiential criteria or its equivalent is a necessary, but not a sufficient, prerequisite for attorney eligibility. There may be instances where an attorney's background objectively satisfies the experiential criteria, but his or her past performance did not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case. Such an attorney should be excluded from the roster list. Consequently, before placing an attorney's name on a roster list, the appointing authority should make an initial determination regarding the attorney's ability to satisfy the experiential criteria. The appointing authority should then make a second determination that the attorney's past performance exemplifies the quality of representation appropriate to capital cases, utilizing the Guidelines established by the authority pursuant to Guideline 11.1. The application of this two-pronged eligibility test will help prevent the mechanical assignment of cases to experientially qualified attorneys who have not demonstrated the requisite skill, dedication, or commitment necessary for capital cases.

This Guideline acknowledges that there are many attorneys who do not possess the experiential criteria detailed in the

Guideline, but who should receive appointments because they will provide competent representation at trial, appeal and/or postconviction. Such attorneys may have criminal law experience which does not meet the experiential criteria, may have attended training in death penalty defense representation or may have substantial experience in civil practice. These attorneys should receive appointments if the appointing authority is satisfied the defendant or inmate will be provided with the same quality of representation as clients represented by attorneys who met the experiential criteria. Attorneys who are appointed under the "Alternate Procedures" clauses of this Guideline obviously have an obligation to consult with other attorneys who are expert in death penalty defense, to attend specialized training and to do whatever else is necessary to allow them to provide competent representation to their clients.

Where the appointment of counsel is to a defender office, the appointing authority may permit both lead and co-counsel to be designated by the office, but should determine that these Guidelines are being used in making that designation.

The resources and experience of an office as a whole may be considered as one factor in determining the qualification of the individual attorneys within that office, but cannot substitute for the personal qualifications of the individual attorneys actually handling death penalty cases. For example, the resources and experience of the office might justify allowing an otherwise qualified attorney within that office to act as lead counsel after somewhat less than five years of personal litigation experience (Guideline 5.1.1.A (ii)) but could not justify allowing an attorney within that office to act as death penalty counsel after only minimal personal criminal litigation experience.

FOOTNOTES:

1. ABA Standards, Providing Defense Services, Standard 5-2.2 commentary.

2. See e.g., the quote of a capital postconviction attorney describing death penalty jurisprudence as "unintelligible," "inconsistent and at times, irrational" as well as "evolving... constantly chang(ing)." American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (prepared by The Spangenberg Group), Time & Expense Analysis in Postconviction Death Penalty Cases (February, 1987) p. 22, quoted in part in Criminal Justice Newsletter, Vol. 18, #10, p. 4 (May 15, 1987).

9. MARYLAND

a. Md. Code Ann., Art. 27A, § 6, reads as follows:

§ 6 Panel attorneys; courts not deprived of authority to appoint counsel in certain situations.

(a) Maintenance of lists; classification pursuant to qualification criteria. -- Each district public defender, subject to the authority and supervision of the Public Defender, shall maintain a confidential list of private attorneys-at-law who shall be available to serve as counsel to indigent persons eligible for legal representation under this article. The attorneys on each list shall be classified into various panels pursuant to qualification criteria set forth by the Public Defender. Such criteria shall be based upon the nature and complexity of the type of offense requiring legal representation, the previous trial or appellate experience of the attorneys, and any other factors considered necessary to insure competent legal representation.

(b) Appointments from panels. -- Except in those cases where representation is provided by an attorney in the Office of the Public Defender, the district public defender, subject to the supervision of the Public Defender, shall appoint attorneys from the appropriate panels to represent indigent persons. The maximum use of panel attorneys shall be made insofar as practicable. * * * * *

b. Md. Regs. Code 14.06.02.05 reads as follows:

.05 Panel Attorney

A. Each district public defender, subject to the authority and supervision of the Public Defender, shall maintain a confidential list of private attorneys- at-law who shall serve as counsel to indigent persons eligible for legal representation by the Office. The attorneys on each list shall be classified into various panels pursuant to qualification criteria set forth by the Public Defender.

B. Classification of Panel Attorneys. Pursuant to Article 27A, § 6(a), Annotated Code of Maryland, the following classes of panel attorneys are established and defined:

(1) Panel A shall be comprised of licensed attorneys whose members are qualified to provide legal representation for an accused charged with a capital offense. To qualify for designation on this panel, an attorney shall have previously participated in a circuit court in at least two capital cases or ten other cases where the maximum penalty was 10 years imprisonment or more.

(2) Panel B shall be comprised of licensed attorneys whose members are qualified to provide legal representation to an accused in a non-capital circuit court proceeding. To qualify for designation on this panel, an attorney shall have previously participated in at least three criminal cases in the circuit court.

(3) Panel C shall be comprised of licensed attorneys whose members are qualified to provide legal representation for an accused in the District Court of Maryland. To qualify for designation on this panel, an attorney shall have previously participated in at least two cases tried in the District Court.

(4) Panel D shall be comprised of licensed attorneys whose members are qualified to provide legal representation for a juvenile in a juvenile proceeding. To qualify for designation on this panel, an attorney shall have previously provided legal representation to a juvenile offender in at least two prior proceedings in the circuit court.

C. Reclassification. The several panels are subject to periodic reclassification by the Office. Any panel attorney

desiring reclassification or wishing to provide qualification information for designation on additional panels is requested to submit a written request for reclassification together with a resume of his professional experience to the district public defender in his locale. The designation and classification of an attorney by the Office shall be based on the experience and accomplishments of the attorney's resume of professional experience, the advice of the judiciary, the advice of the local district advisory board, and local bar association.

10. MISSISSIPPI

Order No. 89-R-99027, of the Supreme Court of Mississippi, June 24, 1999, reads in relevant part as follows:

SUPREME COURT OF MISSISSIPPI

IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE-RULE 22
June 24, 1999
NO. 89-R-99027
ORDER

This matter has come before the Court en banc, on its own motion, for consideration and adoption of standards and qualifications of attorneys representing those under sentence of death seeking post-conviction relief. Having considered the matter, the Court finds that the interest of the fair and efficient administration of justice will be served by the adoption of such standards and qualifications, and that the Mississippi Rules of Appellate Procedure should be amended to incorporate such standards and qualifications.

IT IS THEREFORE ORDERED that Rule 22 of the Mississippi Rules of Appellate Procedure be amended as set forth in Exhibit "A" to this order.

IT IS FURTHER ORDERED that the standards and qualifications here adopted shall be effective as to attorneys appointed or retained from and after the entry of this Order to

represent those under sentence of death seeking post-conviction relief.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this Order upon the minutes of the Court and shall forward a true certified copy hereof to West Publishing Company for publication in the Southern Reporter (Mississippi Edition) and in the Mississippi Rules of Court.

SO ORDERED, this the 24th day of June, 1999.

WILLIAM L. WALLER, Jr.
Justice For the Court

EXHIBIT "A" TO ORDER

RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

* * * * *

(c) Standards and Qualifications for Attorneys Appointed or Retained to Represent Those under Sentence of Death in Post-conviction Proceedings.

Counsel representing those under a sentence of death seeking post-conviction relief shall,

(1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46, and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment.

(2) Be admitted to practice in the federal courts of Mississippi and before the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas.

(3) Have practiced in the area of state criminal appeals or post- conviction proceedings for three years immediately preceding appointment.

(4) Have not previously represented the capital defendant in the case either in the trial court or in the direct appeal, unless

the defendant and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation, and

(5) Have within three years immediately preceding the appointment been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as lead counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding; or, in the alternative, have within such period been lead counsel in the appeal of at least six felony convictions, at least two of which were appeals from murder convictions, and lead counsel in at least two post- conviction proceedings.

Provided, however, under exceptional circumstances, and with the consent of the Supreme Court, an attorney may be appointed who does not meet the stated qualifications upon a showing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in the rule.

(d) Education and Training of Attorneys Appointed or Retained to Represent Those under Sentence of Death in Post-conviction Proceedings. Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the defendant is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association.

11. MISSOURI

a. Mo. Sup. Ct. R. 24.036 reads as follows:

RULE 24.036 CONVICTION AFTER GUILTY PLEA--CORRECTION--DEATH SENTENCE--APPOINTMENT OF COUNSEL

(a) When a motion is filed as provided in Rule 24.035 to set aside a sentence of death, the court shall find on the record

whether the movant is indigent. If the movant is indigent, the court shall cause to be appointed two counsel to represent the movant. If movant seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences. Unless the movant is so competent and understands the legal consequences, movant shall not be permitted to reject the appointment of counsel.

(b) All counsel appointed as provided in this Rule 24.036 shall be members of The Missouri Bar or shall be admitted to practice in the particular case as provided in this Court's Rule 9. At least one of the counsel shall meet the following qualifications:

(1) Have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought; and

(2) Have at least three years litigation experience in the field of criminal law; and

(3) Have participated as counsel or co-counsel to final judgment in at least five post-conviction motions involving class A felonies in either state or federal trial courts; and

(4) Have participated in either state or federal court as counsel or co- counsel to final judgment in at least:

(A) three felony jury trials; or

(B) five direct criminal appeals in felony cases.

Counsel shall certify to the state public defender in such form as the defender may require that counsel meets the qualifications of this Rule 24.036 prior to filing counsel's entry of appearance in the case.

(c) Counsel appointed to represent the movant shall not have represented the movant at trial or on the direct appeal therefrom.

(d) As to any counsel appointed as provided in this Rule 24.036, the state public defender shall provide counsel with

reasonable compensation and shall provide reasonable and necessary litigation expenses.

(e) This Rule 24.036 shall be applicable to all motions filed on or after July 1, 1997, as provided in Rule 24.035.

b. Mo. Sup. Ct. R. 29.16 reads as follows:

RULE 29.16 CONVICTION AFTER TRIAL--CORRECTION--DEATH SENTENCE--APPOINTMENT OF COUNSEL

(a) When a motion is filed as provided in Rule 29.15 to set aside a sentence of death, the court shall find on the record whether the movant is indigent. If the movant is indigent, the court shall cause to be appointed two counsel to represent the movant. If movant seeks to reject the appointment of counsel, the court shall find on the record, after a hearing if necessary, whether the movant is able to competently decide whether to accept or reject the appointment and whether the movant rejected the offer with the understanding of its legal consequences. Unless the movant is so competent and understands the legal consequences, movant shall not be permitted to reject the appointment of counsel.

(b) All counsel appointed as provided in this Rule 29.16 shall be members of The Missouri Bar or shall be admitted to practice in the particular case as provided in this Court's Rule 9. At least one of the counsel shall meet the following qualifications:

(1) Have attended and successfully completed within two years immediately preceding the appointment at least twelve hours of training or educational programs on the post-conviction phase of a criminal case and federal and state aspects of cases in which the death penalty is sought; and

(2) Have at least three years litigation experience in the field of criminal law; and

(3) Have participated as counsel or co-counsel to final judgment in at least five post-conviction motions involving class A felonies in either state or federal trial courts; and

(4) Have participated in either state or federal court as counsel or co- counsel to final judgment in at least:

(A) three felony jury trials; or

(B) five direct criminal appeals in felony cases.

Counsel shall certify to the state public defender in such form as the defender may require that counsel meets the qualifications of this Rule 29.16 prior to filing counsel's entry of appearance in the case.

(c) Counsel appointed to represent the movant shall not have represented the movant at trial or on the direct appeal therefrom.

(d) As to any counsel appointed as provided in this Rule 29.16, the state public defender shall provide counsel with reasonable compensation and shall provide reasonable and necessary litigation expenses.

(e) This Rule 29.16 shall be applicable to all motions filed on or after July 1, 1997, as provided in Rule 29.15.

12. MONTANA

a. Mont. Code Ann. § 46-21-201 reads as follows:

§ 46-21-201. Proceedings on petition

(1) (a) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and upon the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as

a matter of law for failure to state a claim for relief or it may proceed to determine the issue.

(b) If the death sentence has been imposed, upon receipt of the response or responses to the petition, the court shall promptly hold a conference to determine a schedule for the expeditious resolution of the proceeding. The court shall issue a decision within 90 days after the hearing on the petition or, if there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the decision is not issued during that period, a party may petition the supreme court for a writ of mandate or other appropriate writ or relief to compel the issuance of a decision.

(c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of procedure governing civil proceedings apply to the proceeding.

(2) If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall appoint counsel for a petitioner who qualifies for the appointment of counsel under Title 46, chapter 8, part 1.

(3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final, the sentencing court shall notify the sentenced person that if the person is indigent and wishes to file a petition under this chapter, the court will appoint counsel who meets the Montana supreme court's standards for competency of appointed counsel in proceedings under this chapter for an indigent person sentenced to death.

(b) Within 75 days after a conviction for which a death sentence was imposed upon a person who wishes to file a petition under this chapter becomes final, the sentencing court shall:

(i) appoint counsel to represent the person if the court finds that the person is indigent and either has accepted the offer of appointment or is unable to competently decide whether to accept the offer of appointed counsel;

(ii) if the offer is rejected by a person who understands the legal consequences of the rejection, enter findings of fact after a hearing, if the court determines that

a hearing is necessary, stating that the person rejected the offer with an understanding of the legal consequences of the rejection; or

(iii) if the court finds that the petitioner is not indigent, deny appointment of counsel.

(c) The court may not appoint counsel who has previously represented the person at any stage in the case unless the person and the counsel expressly agree to the appointment.

(d) If a petitioner entitled to counsel under this subsection (3) is not indigent at the time that the court's determination is made under subsection (3)(b) but thereafter becomes indigent at any stage of the proceedings, the court shall appoint counsel as provided in subsection (3)(b)(i).

(e) The expenses of counsel appointed pursuant to this subsection (3) must be paid as provided in 46-8-201.

(f) Violation of this subsection (3) is not a basis for a claim or relief under this chapter.

(4) The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the court has ordered or to which the parties have agreed.

(5) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for the hearing.

(6) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment, retrial, custody, bail, or discharge that may be necessary and proper. If the court finds for the prosecution, the petition must be dismissed.

b. Order No. 97-326 of the Supreme Court of the State of Montana reads in relevant part as follows:

* * * * *

IT IS ORDERED that the attached Standards for the Competency of Counsel for Indigent Persons in Death Penalty Cases shall be effective for appointments of counsel from and after January 1, 2000.

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STANDARDS FOR COMPETENCY OF COUNSEL FOR INDIGENT PERSONS IN DEATH PENALTY CASES

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III POSTCONVICTION PHASE

The following standards shall apply to counsel appointed by the district court to represent indigent petitioners in post conviction proceedings under Title 46, Chapter 21, who are sentenced to death.

1. The district court shall follow the procedures set forth in § 46-21-201, MCA, in appointing counsel in state post conviction cases.

2. The district court shall appoint two counsel. One of he appointed counsel may be an attorney who has been admitted *pro hoc vice*. Lead counsel shall satisfy all of the following:

a. He or she must be an active member in good standing of the Montana State Bar or be admitted *pro hoc vice*.

b. He or she must have at least 5 years criminal trial, criminal appellate, or state or federal postconviction experience, which experience may have been obtained in Montana or in another jurisdiction.

c. He or she must has completed or taught, in the two-year period prior to appointment or with 90 days after appointment, a continuing legal education course or courses, approved for credit by the

appropriate authority under the rules adopted by the Montan Supreme Court, at least 12 hours of which deal with subjects related to the defense of persons accused or convicted of capital crimes.

3. In addition, the appointed attorney, either individually or in combination, shall have the following qualifications obtained in Montana or another jurisdiction:

a. Experience as counsel for either the defendant or the state in the trial of one deliberate homicide case;

b. Experience as counsel for either the defendant or the state in the trial of three felony cases;

c. Experience as counsel for either the defendant or the state in the direct appeal of three felony convictions; and

d. Experience as counsel for either the defendant or the state in three cases involving claims for state postconviction or federal habeas corpus review.

4. As used in this Order, "trial" means a case concluded with a judgment of acquittal under § 46-18-102(2), MCA, or submission to the trial court or the jury for decision and verdict.

* * * * *

13. NEVADA

Nev. Sup. Ct. R. 250 reads in relevant part as follows:

Rule 250. Procedure in Capital Proceedings

1. The Scope and Purposes of This Rule. The provisions of this rule apply only in cases in which the death penalty is or may be sought or has been imposed, including proceedings for post-conviction relief from a judgment of conviction and sentence of death. This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. The purposes of this rule are: to ensure that

capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases.

2. Appointment and Qualifications of Counsel.

(a) Applicability. This section applies to all defense counsel including public defenders who are appointed to represent indigent persons in capital cases.

(b) Trial counsel. Unless the district court determines pursuant to subsection (2)(e) that defense counsel otherwise has the competence to represent an indigent person in a capital case, an attorney appointed as lead counsel at trial at a minimum must have: (1) acted as lead defense counsel in five felony trials, including one murder trial, tried to completion (i.e., to a verdict or a hung jury); (2) acted as defense co-counsel in one death penalty trial tried to completion; (3) been licensed to practice law at least three years; and (4) completed within the prior eighteen months at least eight-hours of continuing legal education relevant to capital case litigation.

(c) Counsel in post-conviction proceedings in district court. Counsel appointed to represent a petitioner for post-conviction relief in the district court must have acted as counsel in at least two post-conviction proceedings arising from felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the petitioner.

(d) Counsel on direct and post-conviction appeal. Counsel appointed to represent an appellant on direct of post-conviction appeal must have acted as counsel in at least two appeals of felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the appellant.

(e) Exceptions. If an attorney does not satisfy the minimum requirements set forth in subsections (2)(b), (c), or (d) of this rule, or if the district court otherwise considers it warranted, the court shall hold a hearing to assess the attorney's competence and ability to act as defense counsel. The court shall thoroughly investigate the attorney's background, training,

and experience and consult with the attorney on his or her current caseload. If satisfied that the attorney is competent and able to provide the representation, the court shall make that finding on the record and appoint the attorney.

(f) Co-counsel. When the district court appoints defense counsel to provide representation at trial, it shall appoint two counsel, one of whom must be qualified under this rule to act as lead counsel in a capital case. When the court appoints defense counsel to provide representation in a direct appeal, a first post-conviction petition for a writ of habeas corpus, or an appeal from such post-conviction proceeding, the court may only appoint one counsel who is qualified under this rule.

(g) Appointment of public defender. When the district court appoints an office of a public defender to provide representation in a capital case, any attorney assigned by the office to act as defense counsel shall prepare and file with the court the application form required by subsection (2)(h) of this rule.

(h) Application forms and list of qualified counsel. Each judicial district shall maintain a list of qualified defense counsel and shall establish procedures to ensure that defense counsel are considered and selected for appointment to capital cases from the list in a fair, equal and consecutive basis. The judicial districts shall further arrange for the preparation and distribution of application forms to defense attorneys who wish to be included on the list. The forms must require specific information respecting the attorney's qualifications to act as defense counsel in a capital case and a complete statement of any discipline or sanctions pending or imposed against the attorney by any court or disciplinary body. Before appointing any attorney to act as counsel in a capital case the district court to which the case is assigned shall carefully consider the information in the attorney's application form.

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14. NEW YORK

N.Y. Ct. Rules § 515.2 reads as follows:

§ 515.2 Standards for State Post-Conviction Counsel in Capital Cases

(1) State Post-Conviction Qualifications and Experience.

(a) State Post-Conviction Counsel. To be eligible to be appointed as lead counsel on an initial motion pursuant to section 440.10 or 440.20 of the Criminal Procedure Law and any appeal therefrom in a capital case, an attorney must demonstrate that he or she:

(1) has at least six years criminal trial, criminal appellate or state or federal post-conviction experience, or has at least four years of concentrated criminal or civil litigation experience;

(2) is familiar with:

(i) the practice and procedure of the trial and appellate courts of New York including the New York Court of Appeals; and

(ii) the practice and procedure of the federal courts with regard to federal habeas corpus petitions;

(3) has conducted twelve trials before judges, arbitration panels or juries to verdict, decision, or hung jury, in serious and complex civil or criminal cases;

(4) has had primary responsibility for the appeal of at least five felony convictions in any state or federal court, at least three of which were on behalf of the defendant, and at least three of which were orally argued by the attorney;

(5) has substantial familiarity with, and extensive experience in the use of, expert witnesses and scientific and medical evidence including, but not limited to, mental health and pathology evidence; and

(6) meets two of the following criteria:

(i) has tried five homicides to verdict or hung jury with at least three as defense counsel;

(ii) has, at the trial level, represented to disposition defendants in eight homicide cases;

(iii) has represented capital defendants in three state or federal post- conviction proceedings;

(iv) has brought five motions, pursuant to section 440.10 or 440.20 of the Criminal Procedure Law, where hearings were held and witnesses examined.

(b) Waiver. If an attorney cannot meet one or more of the requirements set forth above, the Screening Panel, after consideration of the recommendation of the Capital Defender Office, may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation, 440 motion practice, appellate and/or post-conviction experience or other exceptional qualifications, is capable of providing effective representation as post-conviction counsel in a capital case.

(2) Applications to Capital Defender Office.

(a) Applications. In support of an application, an attorney shall submit to the Capital Defender Office a form prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts. It shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement that he or she requests be waived, and shall set forth in detail his or her criminal or civil litigation, 440 motion practice, appellate and/or post-conviction experience or other exceptional qualification that justify waiver.

(b) Required Submissions. In support of an application, an attorney shall submit to the Capital Defender Office:

(1) a description of a trial or post-conviction strategy in a case handled by the attorney and reflective of the attorney's thorough advocacy. This strategy may have, for instance, aimed to achieve a favorable pre-trial disposition or to alter the range of sentencing options;

(2) at least two memoranda of law prepared by the attorney in connection with separate cases;

(3) at least two appellate briefs written exclusively or primarily by the applicant, the opposing briefs, and the decisions;

(4) the names, addresses, and phone numbers of two prosecutors and two defense attorneys, current or former, including at least one adversary, familiar with the applicant's work as an effective advocate;

(5) the applicant may submit the name, address, and phone number of one judge, if the judge is familiar with the applicant's work as an effective advocate;

(6) a description of specialized trial, appellate or post-conviction capital defense training programs regularly attended; and

(7) any other material that may be relevant to fully evaluate the applicant's qualifications and experience.

(3) Creation of Court of Appeals Roster.

(a) Delivery to Screening Panel. The Capital Defender Office shall review each application to determine that it is complete. The Capital Defender Office shall deliver all completed applications, within 30 days of their receipt, to roster of attorneys qualified for appointment as post-conviction counsel in a capital case.

(4) Additions to Court of Appeals Roster.

(a) Requests for Reconsideration. Any attorney whose application for designation as qualified post-conviction counsel is rejected by a Screening Panel may apply to the Court of Appeals for reconsideration of his or her application pursuant to such procedures as may be prescribed by the Court of Appeals.

(b) Determination by the Court of Appeals. The Court of Appeals shall review each such application pursuant to the criteria set forth in these standards, including consideration of the recommendations of the Capital Defender Office and of the Screening Panel, and may add that attorney to the roster of qualified post-conviction counsel if the Court deems the attorney qualified to serve as post-conviction counsel in a capital case.

(5) Training.

(a) Certification. An attorney shall not be eligible to be appointed as post-conviction counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a capital post- conviction course prescribed by the Capital Defender Office and approved by the Administrative Board of the Courts.

(b) Interim Certification. The Screening Panel, or the Court of Appeals, in its discretion, may permit an attorney to be eligible for such appointment if the attorney meets all of the other requirements for qualification and experience, and the Capital Defender Office confirms that such attorney is in active pursuit of such training and certification.

(6) Retention of Eligibility.

(a) On-Going Training. To remain eligible for appointment as counsel on an initial motion pursuant to section 440.10 or 440.20 of the Criminal Procedure Law and an appeal therefrom, an attorney must attend and successfully complete capital training sessions as prescribed by the Capital Defender Office.

(b) Removal from the Court of Appeals Roster. The Court of Appeals may remove from its roster of attorneys any attorney who, in the Court's judgment, has not provided competent, thorough representation.

15. OHIO

a. Ohio Rev. Code Ann. § 2953.21 reads in relevant part as follows:

§ 2953.21 PETITION FOR POSTCONVICTION RELIEF

* * * * *

(I)(1) If a person who has received the death penalty intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the

appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. * * * * *

(2) * * * * * The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 65 of the Rules of Superintendence for Courts of Common Pleas to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. * * * * *

* * * * *

b. Rule 20 of Ohio Sup. Ct. R. of Superintendence for the Courts of Ohio (formerly Ohio C.P. Sup. R. 65) reads as follows:

SUP. R. 20 APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES-COURTS OF COMMON PLEAS

I. APPLICABILITY

(A) This rule shall apply in cases where an indigent defendant has been charged with or convicted of an offense for which the death penalty can be or has been imposed.

(B) The provisions for the appointment of counsel set forth in this rule apply only in cases where the defendant is indigent, counsel is not privately retained by or for the defendant, and the death penalty can be or has been imposed upon the defendant. This rule does not apply in the case of a juvenile defendant who is indicted for a "capital offense" but because of his or her age cannot be sentenced to death.

(C) If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule. If the defendant engages one privately retained attorney, the court shall not appoint a second attorney pursuant to this rule.

* * * * *

II. QUALIFICATIONS FOR CERTIFICATION AS COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES

(A) Trial Counsel.

(1) At least two attorneys shall be appointed by the court to represent an indigent defendant charged with an offense for which the death penalty may be imposed. At least one of the appointed counsel must maintain a law office in Ohio and have experience in Ohio criminal trial practice.

The counsel appointed shall be designated "lead counsel" and "co-counsel."

(2) Lead counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;

(b) Have at least five years of civil or criminal litigation or appellate experience;

(c) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two-year period prior to making application;

(d) Have at least one of the following qualifications:

(i) Experience as "lead counsel" in the jury trial of at least one capital case;

(ii) Experience as "co-counsel" in the trial of at least two capital cases;

(e) Have at least one of the following qualifications:

(i) Experience as "lead counsel" in the jury trial of at least one murder or aggravated murder case;

(ii) Experience as "lead counsel" in ten or more criminal or civil jury trials, at least three of which were felony jury trials;

(iii) Experience as "lead counsel" in either: three murder or aggravated murder jury trials; one murder or aggravated murder jury trial and three felony jury trials; or three aggravated or first- or second-degree felony jury trials in a

court of common pleas in the three years prior to making application.

(3) Co-counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;

(b) Have at least three years of civil or criminal litigation or appellate experience;

(c) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;

(d) Have at least one of the following qualifications:

(i) Experience as "co-counsel" in one murder or aggravated murder trial;

(ii) Experience as "lead counsel" in one first-degree felony jury trial;

(iii) Experience as "lead" or "co-counsel" in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application.

(4) As used in this rule, "trial" means a case concluded with a judgment of acquittal under Criminal Rule 29 or submission to the trial court orjury for decision and verdict.

(B) Appellate Counsel.

(1) At least two attorneys shall be appointed by the court to appeal cases where the trial court has imposed the death penalty on an indigent defendant. At least one of the appointed counsel shall maintain a law office in Ohio.

(2) Appellate counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;

(b) Have at least three years of civil or criminal litigation or appellate experience;

(c) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;

(d) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the appeal of

cases in which the death penalty was imposed in the two years prior to making application;

(e) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application.

(C) Exceptional Circumstances. If an attorney does not satisfy the requirements of divisions (A)(2), (A)(3), or (B)(2) of this section, the attorney may be certified as lead counsel, co-counsel, or appellate counsel if it can be demonstrated to the satisfaction of the Committee that competent representation will be provided to the defendant. In so determining, the Committee may consider the following:

(a) Specialized training on subjects that will assist counsel in the trial or appeal of cases in which the death penalty may be or was imposed;

(b) Experience in the trial or appeal of criminal or civil cases;

(c) Experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial;

(d) Any other relevant considerations.

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16. OREGON

Or. R. Appt. Counsel Standard 3.1 reads in relevant part as follows:

QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT INDIGENT PERSONS AT STATE EXPENSE

STANDARD 3.1 QUALIFICATIONS TO SERVE AS APPOINTED COUNSEL FOR INDIGENT PERSONS BY CASE TYPE

Subject to the provisions of Standard 4.1, the appointing authority shall appoint only those attorneys who:

1. Are members of the Oregon State Bar or are attorneys of the highest court of record in any other state or country who will appear under ORS 9.241; and

2. Either:

a. Meet the qualifications specified below for the applicable case type; or

b. Possess significant experience and skill equivalent to or exceeding the qualifications specified below, and who demonstrate to the appointing authority's satisfaction that the attorney will provide competent and adequate representation; and

3. Have adequate legal research access and adequate facilities to ensure reasonable and timely personal and telephonic contact between attorney and client and between the court and attorney.

a. Adequate facilities include sufficient support staff or answering service/machine for receiving messages and notifying clients of court dates.

b. Adequate legal research access includes the attorney's office is located convenient to a law library of sufficient size or the attorney has "on-line" or other electronic access to ensure

the attorney has ready access to legal references and research material; and

4. Have reviewed and are familiar with the Oregon State Bar's Indigent Defense Task Force Report, "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases" (Approved by the Board of Governors September 25, 1996), Exhibit C to this policy statement.

These standards establish and specify qualifications for each of the following case type:

A. Misdemeanor cases and misdemeanor probation violation proceedings in trial courts.

B. Lesser felonies (all Class C felonies other than homicides and drug cases), felony probation violation proceedings, and contempt proceedings in trial courts.

C. Major felonies (all A and B felonies, all drug felonies, and all homicides other than murder and capital murder cases) in trial courts.

D. Murder cases in trial courts.

E. Capital murder cases other than in postconviction proceedings in trial courts.

F. Civil commitment proceedings in trial courts.

G. Juvenile proceedings in trial courts.

H. Appeals other than in murder and capital murder cases.

I. Appeals in murder and capital murder cases.

J. Postconviction proceedings in murder and capital murder cases.

K. Postconviction proceedings in other cases.

L. Habeas corpus proceedings.

* * * * *

B. Minor Felony Cases; Felony Probation Violation Proceedings; Contempt Proceedings. Lesser felony cases include all Class C felonies other than homicides and drug cases.

An attorney is qualified for appointment to lesser felony cases, felony probation violation proceedings, and contempt proceedings if he or she:

1. Meets the qualifications specified in Section A; and

2. Has continued to meet the qualifications in Section A for at least nine months; and

3. Has served as counsel or as co-counsel and has handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and

4. In at least one felony trial submitted to a jury, has associated on a pro bono or paid basis as co-counsel with an attorney who has previously tried felony cases and is otherwise qualified to try felony cases under these standards; and

5. On request, can present an additional showing of expertise and competence in the area of criminal trial practice by submitting at least three letters of reference from other criminal trial lawyers or judges the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of up to five years; or

6. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

C. Major Felony Cases. Major felony cases include all A and B felonies, all drug felonies, and all homicides other than murder and capital murder cases.

An attorney is qualified for appointment to major felony cases if he or she:

1. Meets the qualifications specified in Section B; and

2. Has continued to meet the qualifications in Section B for nine months and has had nine months of lesser felony trial experience in a public defender or a district attorney office or in private practice; and

3. On request, can present evidence of additional expertise and competence in the area of criminal trial practice by submitting at least five letters of reference from other criminal trial lawyers or judges that the attorney has appeared before on criminal cases. The letters must explain why the attorney has special experience and competence to handle felony cases involving potential incarceration of 20 years; or

4. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

D. Murder Cases.

1. Lead Counsel. An attorney is qualified for appointment as lead counsel in murder cases, not including capital murder, if he or she:

a. Meets the qualifications specified in Section C; and

b. Has been trying major felony cases for the past three years; and

c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the most serious penalties can be imposed, including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence; and

d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict; and

e. On request, can demonstrate the above by:

1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a murder case; and

2) Certification from those with knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend murder cases and explaining why the attorney has the qualities required. Certification must include at least five letters from at least two of the following three groups:

a) Judges before whom the attorney has appeared;

b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; and

c) District attorneys or deputies against whom or with whom the attorney has tried cases; or

f. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

2. Co-counsel. Co-counsel in murder cases must meet the qualifications in subparagraphs 1.a, b, c, and e of this section or must possess significant equivalent experience under Standard 3.1.2.b.

E. Capital Murder Cases.

1. Lead Counsel. An attorney is qualified for appointment as lead counsel in capital murder cases if he or she:

a. Meets the qualifications specified in Section C; and

b. Has been trying major felony cases for the past five years; and

c. Has demonstrated to persons with knowledge of his or her practice a high level of learning, scholarship, training, experience, and ability to provide competent and vigorous representation to defendants charged with a crime for which the death penalty can be imposed, including handling cases involving codefendants, a significant number of witnesses, and cases involving suppression issues, psychiatric issues and scientific evidence; and

d. Has acted as lead counsel or co-counsel in a significant number of major felonies tried to a jury, which should include at least one homicide case that was tried to a jury and went to a final verdict. Lead counsel in capital cases must have acted as counsel or co-counsel in at least one murder case that was tried to a jury and went to a final verdict; and

e. For appointment as lead or co-counsel in a capital case, has completed, within one year of the appointment, a legal training or education program on capital cases; and

f. On request, can demonstrate the above by:

1) A written statement by the attorney explaining why the attorney believes that he or she has the qualifications required to handle a capital murder case; and

2) Certification from those with knowledge of the attorney's practice, indicating that they believe that the attorney should be allowed to defend capital murder cases and explaining why the attorney has the qualities required.

Certification must include at least five letters from at least two of the following three groups:

a) Judges before whom the attorney has appeared;

b) Defense attorneys who are recognized and respected by the local bar as experienced criminal trial lawyers and who have knowledge of the attorney's practice; or

c) District attorneys or deputies against whom or with whom the attorney has tried cases; and

g. Has demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to capital cases.

2. Co-counsel. Co-counsel in capital murder cases must meet the qualifications in subparagraphs 1.a, b, c, e, f, and g of this section or must possess significant equivalent experience under Standard 3.1.2.b.

3. Alternate Procedures. The appointing authority also may appoint as lead or co-counsel an attorney with extensive criminal trial experience or extensive civil litigation experience, if the attorney clearly demonstrates to the appointing authority that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph must meet one or more of the following qualifications:

a. Experience in the trial of death penalty cases that does not meet the levels detailed in paragraphs A or B above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

4. Limited Case Load. An attorney shall not handle more than two capital cases at the same time without prior authorization from the State Court Administrator.

* * * * * *

H. Appeals Other Than in Murder and Capital Murder Cases. An attorney is qualified for appointment in appeals other than in murder and capital murder cases if he or she:

1. Has reviewed and is familiar with:

a. ORS 138.005-138.680 in the case of appeals of criminal cases;

b. Oregon State Bar, Criminal Law (1986) in the case of appeals of criminal cases;

c. ORS 419.561 and 19.005-19.220 in the case of appeals of juvenile cases;

d. In the case of appeals of juvenile cases, Oregon State Bar, Juvenile Law, Chapter 30 (1984, Supp.1988);

e. The Oregon Rules of Appellate Procedure; and

f. Oregon State Bar, Appeal and Review (1977, Supps.1983, 1986); and

2. Meets at least one of the following criteria:

a. Has experience as appellate counsel, either in practice or under the Student Appearance Rule commensurate with the seriousness of the underlying case; or

b. Has served as co-counsel in at least one appellate case under the supervision of an attorney eligible for appointment to appellate cases under this standard; or

c. Has observed oral argument and reviewed the appellate record in at least five appellate cases, at least one of which was an appeal from conviction of a major felony or murder; or

d. Has significant experience in motion practice and arguments in state circuit or district court or federal district court; or

e. By any other evidence that shows experience, education, and skill in appellate advocacy; or

3. In lieu of the above qualifications, possesses significant equivalent experience under Standard 3.1.2.b.

I. Appeals in Murder and Capital Murder Cases. An attorney is qualified for appointment in appeals in murder and capital murder cases if he or she:

1. Meets the qualifications specified in Section H; and

2. For appointment as lead counsel, is an experienced and active trial or appellate lawyer with at least three years experience in criminal defense; and

3. Has demonstrated the necessary proficiency and commitment that exemplify the quality of representation appropriate to:

a. Capital murder cases if the appeal is in a capital case; or

b. Other murder cases, if the appeal is in a noncapital murder case; and

4. Has demonstrated proficiency in appellate advocacy in felony defense; and

5. For lead counsel in capital murder appeals, within one year of the appointment has attended and completed a legal training or educational program on defending capital cases. A substantial portion of the program must have been directly relevant to appeals in capital cases; and

6. For co-counsel in capital murder appeals and for lead or co-counsel in other murder cases, has attended and completed a legal training or education program on appellate advocacy in criminal cases within two years of the appointment.

7. Alternate Procedure for Appointment in Capital Cases. The appointing authority also may appoint as lead or co-counsel an attorney with extensive criminal trial or appellate experience, or both, or extensive civil litigation or appellate experience, or both, if the attorney clearly demonstrates to the appointing authority that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph shall meet one or more of the following qualifications:

a. Experience in the trial or appeal, or both, of death penalty cases that does not meet the levels detailed in paragraphs A or B above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

J. Postconviction Proceedings in Murder and Capital Murder Cases. An attorney is qualified for appointment in postconviction proceedings in murder and capital cases if he or she:

1. Meets the qualifications specified in Section D; and

2. For appointment as lead counsel, has prior experience as postconviction counsel in at least three major felony cases; and

3. For capital cases, meets the qualifications specified in Section I for co- counsel in capital appeals. If more than one attorney is appointed, only one of the attorneys must meet the qualifications specified in Section I.

4. Alternate Procedure in Capital Cases. The appointing authority also may appoint as lead and co-counsel an attorney with extensive criminal trial, appellate, or postconviction experience or extensive civil litigation or appellate experience, or both, if the attorney clearly demonstrates that the attorney can and will provide competent representation to the capitally charged indigent defendant. Attorneys appointed under this paragraph shall meet one or more of the following qualifications:

a. Experience in trial, appeal, or postconviction representation in death penalty cases that does not meet the levels detailed in paragraph A above;

b. Specialized postgraduate training in the defense of persons accused of capital crimes;

c. The availability of ongoing consultation support from experienced death penalty counsel.

Attorneys appointed under this paragraph should be pre-screened by a panel of experienced death penalty attorneys to ensure that they will provide competent representation.

* * * * *

17. SOUTH CAROLINA

a. S.C. Code Ann. § 17-27-160 reads in relevant part as follows:

§ 17-27-160. Capital case post-conviction relief procedures.

(A) If a defendant has been sentenced to death in South Carolina, he must file his application for post-conviction relief in the county in which he was indicted for the crime resulting in the sentence of death. * * * * *

(B) Upon receipt of the application for post-conviction relief, the counsel for the respondent shall file a return within thirty days after receipt of the application.

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense. The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings.

* * * * *

* * * * *

b. S.C. Code Ann. § 16-3-26 reads in relevant part as follows:

§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

* * * * *

(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

* * * * *

(F) The Supreme Court shall promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases.

* * * * *

c. S.C. R. Ct. 608 reads in relevant part as follows:

RULE 608. APPOINTMENT OF LAWYERS FOR INDIGENTS

* * * * *

(c) Lists.

(1) For each appointment year, the South Carolina Bar shall prepare two lists for each county:

(A) A list of all active members who have been certified by the Supreme Court to serve as lead counsel in death penalty cases who are eligible for appointment in the county.

(B) A list of all other active members eligible for appointment in the county. This list shall indicate the number of years the member has been admitted to practice law in South Carolina.

* * * * * *

(f) Appointments and Relief from Appointments.

(1) The appointment of a lead counsel to represent an indigent defendant in a death penalty case or an indigent death-sentenced inmate in a post-conviction relief action shall be made from the list of members specified in (c)(1)(A) above; provided, however, that lawyers who are not certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160. The appointments for an indigent in any other case, to include second counsel in a capital case, shall be made from the list specified in (c)(1)(B).

* * * * *

18. TENNESSEE

Tenn. R. Sup. Ct. 13 reads in relevant part as follows:

RULE 13. APPOINTMENT, QUALIFICATIONS, AND COMPENSATION OF COUNSEL FOR INDIGENT DEFENDANTS

Section 1. Right to Counsel and Procedure for Appointment of Counsel.

(a) The purpose of this rule is to establish qualifications and procedures for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel for indigent defendants in trials, direct appeals, and post-conviction proceedings. This rule is intended to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(b) There shall be maintained for each trial court exercising criminal jurisdiction a roster of attorneys who have demonstrated the commitment and proficiency necessary for providing effective assistance of counsel from which roster appointments will be made, provided, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent defendant" or "defendant") according to the procedures and standards set forth in this rule.

(d) In the following cases and in all other cases required by law, the court shall advise any party who is without counsel that he or she has the right to be represented by counsel throughout the case and that counsel will be appointed to represent the party if he or she is indigent and requests the appointment of counsel.

* * * * *

(6) In all post-conviction proceedings in capital cases;

* * * * *

(h) The court shall designate the public defender, the post-conviction defender, their staffs or other attorneys employed by the state for that purpose (hereinafter "public defender") as appointed counsel if available and qualified pursuant to this rule; and, if the public defender is not available or qualified, the court shall designate counsel from a roster of private attorneys approved by the court.

* * * * *

Section 3. Minimum Qualifications and Compensation of Counsel in Capital Cases.

(a) For the purposes of this rule, a capital case is a case in which an indigent defendant is being tried for first degree murder and the state has filed and not withdrawn notice to seek the death penalty as provided in Tenn Code Ann. § 40-14-204; and a capital case on appeal and in post- conviction proceedings is a case in which the defendant is under a sentence of death.

(b) At least two attorneys must be appointed to represent a defendant at trial in a capital case. At least one of the attorneys appointed must maintain a law office in the state of Tennessee and have significant experience in Tennessee criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel."

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to the practice pro hac vice;

(2) have for at least three years regularly represented defendants in criminal jury trials;

(3) have had a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(4) have at least one of the following:

(A) experience as lead counsel in the jury trial of at least one capital case;

(B) experience as co-counsel in the trial of at least two capital cases;

(C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case; or

(D) experience as lead counsel or sole counsel in at least three murder jury trials; or one murder jury trial and three felony jury trials.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

(2) have had a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and

(3) have at least one of the following qualifications:

(A) qualify as lead counsel under (c) above;

(B) experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

* * * * *

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as new appellate counsel; or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. They also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts;

* * * * *

* * * * *

19. UTAH

a. Utah Code Ann. § 78-35a-202 reads in relevant part as follows:

§ 78-35a-202 Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent defendants.

(2) (a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent and make findings on the record regarding the defendant's indigency. If the court finds that the defendant is indigent, it shall promptly appoint counsel who is qualified to represent defendants in death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure.

* * * * *

b. Utah R. Crim P. 8 reads in relevant part as follows:

RULE 8. APPOINTMENT OF COUNSEL

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below

that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;

(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(4) the diligence, competency and ability of the attorneys being considered; and

(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one attorney must have served as counsel in at least three felony appeals; and

(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. § 78-35a-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

* * * * *

20. VIRGINIA

a. Va. Code Ann. § 19.2-163.7 reads as follows:

§ 19.2-163.7 Counsel in capital cases.

In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Public Defender Commission pursuant to § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. If the sentence of death is affirmed on appeal, the court shall, within thirty days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

b. Va. Code Ann. § 19.2-163.8 reads as follows:

§ 19.2-163.8 List of qualified attorneys.

A. The Public Defender Commission, in conjunction with the Virginia State Bar, shall adopt standards for the appointment of counsel in capital cases, which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court

system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation.

B. The Public Defender Commission shall maintain a list or lists of attorneys admitted to practice law in Virginia who are qualified to represent indigent defendants charged with capital murder or sentenced to death. In establishing such a list or lists, the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation.

C. Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the lists or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

D. Noncompliance with the requirements of this article shall not form the basis for a claim of error at trial, on appeal, or in any habeas corpus proceeding. The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.

E. By July 1, 1992, the Public Defender Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on a list for appointment.

F. The provisions of this article, with the exception of subsection E, shall not become effective until July 1, 1992.

c. Va. Admin. Code 30-10-10 reads as follows:

CHAPTER 10. STANDARDS FOR THE QUALIFICATIONS OF APPOINTED COUNSEL IN CAPITAL CASES

6 VAC 30-10-10. Standards.

Pursuant to § 19.2-163.8 E of the Code of Virginia, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases. [FN*] While § 19.2-163.7 of the Code of Virginia, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to "lead counsel" [FN**] and "co-counsel." If a public defender is appointed as either "lead" or "co-counsel," the other attorney should be appointed from the private bar.

A. Trial counsel

1. Court-appointed "lead counsel" shall:

a. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.

b. Have at least five years of criminal litigation practice with demonstrated competence.

c. Have had, within the past two years, some specialized training in capital litigation.

d. Have at least one of the following qualifications:

(1) Experience as "lead counsel" in the defense of at least one capital case;

(2) Experience as "co-counsel" in the defense of at least two capital cases;

(3) Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.

e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.

f. Have demonstrated proficiency and commitment to quality representation.

2. Court-appointed "co-counsel" must:

a. Meet all of the requirements of "lead counsel" except as set forth in subdivisions 1 b and 1 d.

b. Have at least one of the following qualifications:

(1) Experience as "lead counsel" or "co-counsel" in a murder trial;

(2) Experience as "lead" or "co-counsel" in at least two criminal jury trials.

B. Appellate counsel. Attorneys qualifying as court appointed "lead counsel" under subsection A 1 automatically qualify as "lead" appellate counsel. Other appointed appellate counsel must meet the following requirements:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice.

2. Have briefed and argued the merits in:

a. At least three criminal cases in an appellate court; or

b. The appeal of a case in which the death penalty was imposed.

3. Have had, within the past two years, some specialized training in capital case litigation and be familiar with the rules and procedure of appellate practice.

C. Habeas corpus counsel.

1. Habeas corpus "lead counsel" shall satisfy one of the following requirements:

a. Be qualified as "lead counsel" pursuant to subsection A 1 and possess familiarity with Virginia as well as federal habeas corpus practice.

b. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving

attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences.

2. Habeas corpus "co-counsel" shall satisfy one of the following requirements:

a. Service as "lead" or "co-counsel" in at least one capital habeas corpus proceeding in Virginia or federal courts, or both, during the last three years;

b. Have at least seven years of civil trial and appellate litigation experience in the Courts of Record of the Commonwealth or federal courts, or both.

[FN*] Whenever the term "capital case" is used, it shall mean a case tried to a jury wherein the sentencing phase was held pursuant to § 19.2-264.2.

[FN**] Whenever the term "lead counsel" is used, this would also include an attorney acting as sole counsel in a case.

21. WASHINGTON

Wa. R. App. P. 16.25 reads as follows:

RULE 16.25 APPOINTMENT OF COUNSEL ON PERSONAL RESTRAINT PETITION IN CAPITAL CASES

Unless petitioner is proceeding pro se or is represented by retained counsel, upon a request by petitioner to the Clerk of the Supreme Court and upon a finding that the petitioner is indigent, the Supreme Court shall appoint counsel to assist in preparing and presenting a first personal restraint petition. Appointed counsel must have demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases. At least one attorney so appointed must have at least three years of

experience in handling appeals or collateral reviews on criminal convictions and must be learned in the law of capital punishment by training or experience.

A list of attorneys qualified for appointment in death penalty personal restraint petitions will be recruited and maintained by a panel created by the Supreme Court. In appointing counsel, the Supreme Court will consider this list. However, the Supreme Court will have the final discretion in the appointment of counsel in personal restraint petitions in capital cases.

Counsel will not be appointed if the petitioner has clearly elected to proceed pro se and the court is satisfied that petitioner's election is knowing, intelligent, and voluntary. An attorney who represented the petitioner at trial will not be appointed. An attorney who represented petitioner on direct appeal will not be appointed unless petitioner and the attorney expressly request continued representation. Statutes providing for payment of expenses with public funds are not superseded by this rule.

The Supreme Court may appoint counsel to assist in a second or subsequent petition in accord with RCW 10.73.150.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 96-1533 TEH

TROY A. ASHMUS, et al., Plaintiffs,

v.

ARTHUR CALDERON, et al., Defendants

[Filed June 14, 1996
Dismissed October 28, 1998]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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* * * * *

D. Does California Have a Rule of Court or Statute that Provides Standards of Competency for Appointment of Counsel in Unitary Proceedings?

Section 2265(a) provides that "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." Defendants argue that California satisfies this requirement by virtue of the interaction between § 20 of the Standards of Judicial Administration Recommended by the

Judicial Council, and Rules of Court 39.5 and 76.5. Section 20, entitled "Guidelines for Appointment of Counsel in Criminal Appeals," provides that each "appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5 *should* follow the guidelines in this section ..." § 20(a) (emphasis added). Section 20(c) provides:

> The Supreme Court *should* maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellants' opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

(emphasis added). These are the only standards of competence identified by defendants.

Section 20 fails to satisfy § 2265(a)'s requirements for three independent reasons: it (1) is not a rule of court or statute; (2) does not impose any binding or mandatory standards; and (3) does not require counsel to have any experience or competence in bringing habeas petitions.

First, section 20, together with the Introductory Statement to the Judicial Council's "rules, standards, and orders," make clear that section 20 is not a rule of court. The Introductory Statement points out that "[t]he Judicial Council is established under article VI, section 6, of the Constitution, and is given various powers and responsibilities to improve the administration of justice." 1996 Cal.Rules of Court at 1 (West 1996). Under its power to "*adopt rules* for court

administration," the Judicial Council has adopted certain Rules of Court, which "have the force of law." *Id.* (emphasis added). In addition, and by contrast, under its power to "*make recommendations* to the courts," the Judicial Council has adopted certain nonmandatory standards, id. (emphasis added), such as section 20. The nonmandatory nature of such standards is repeatedly emphasized in the Introductory Statement, and in section 20 itself:

> The nonmandatory nature of the standards is indicated by the use of `should' instead of the mandatory `shall'. Standards make recommendations on practice and procedure, express goals that courts and judges are urged to try to attain, and state guidelines for discretionary action. Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them ...

Id. at 1; *see also, e.g.*, section 20(a) ("Each appellate court ... should follow...."); section 20(b) ("Each Court of Appeal should maintain ..."); section 20(c) ("The Supreme Court should maintain ...").

Second, and relatedly, section 20 does not impose any binding or mandatory standards on the California Supreme Court. Nor have defendants provided any indication that the Supreme Court has followed § 20(c)'s recommendation and adopted these standards as binding upon itself. Defendants attempt to brush aside this objection by asserting that the Act does not require that the standards be "inexorably mandatory."[28] Defs.' 2d Opp'n at 10. However, the language

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28. Alternatively, defendants argue that Rules of Court 39.5 and 76.5 somehow render the guidelines mandatory. They do not. Rule 76.5, which governs appointment of counsel in criminal cases, provides in relevant part that "Each Court of Appeal shall maintain at least two lists [of qualified attorneys]. In establishing the lists, the court shall consider the

of the Act and the legislative history discussed above demonstrate that Congress deemed the provision of competent counsel at all stages of proceedings as essential to the quid pro quo tradeoff envisioned under chapter 154. Congress' express and repeated mandate that any qualifying mechanism must provide standards for the appointment of counsel would be meaningless if the decision whether to apply those standards was left to the complete discretion of the court or the guideline administrator.

Defendants do acknowledge that "if and when the supreme court ever finds it necessary to revise its procedures to allow that capital appointments be made on a *standardless* basis, then

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guidelines insection 20 ..." Rule 76.5(b).

Three points bear mentioning. First, Rule 76.5 only requires the court to *consider* the § 20 guidelines. It does not render the guidelines binding or mandatory. Second, Rule 76.5, by its terms, applies only to criminal appeals, not to habeas proceedings. Habeas corpus petitions are considered to be "*original* proceedings seeking release or modification of custody," not appeals from lower courts. Rule of Court 56.5; *In re Carpenter*, 9 Cal.4th 634, 645, (1995) (noting that California Constitution "grants original subject matter jurisdiction over habeas corpus proceedings to the superior court, the Court of Appeal, and [the Supreme Court]"). Third, Rule 76.5's reference to "Each Court of Appeal" almost certainly does not refer to the state Supreme Court. The only citable decision discussing this section failed to interpret the phrase so broadly. *People v. Hackett*, 43 Cal.Rptr.2d 219, 228 (Cal.App.1st Dist.1995); *but see* Rule of Court 61(d) (noting that for the purposes of rules 61 to 69, "Court of Appeal" shall also mean "Supreme Court.")

Next defendants contend that Rule 39.5 resolves "any conceivable ambiguity" about Rule 76.5's application to the Supreme Court's alleged unitary review procedure. Rule 39.5 provides that "[t]he rules *governing appeals* from the superior court in other criminal cases apply to *appeals* from judgments rendering the penalty of death ..." (emphasis added). Rule 39.5 does not render Rule 76.5, let alone s 20, binding on the Supreme Court, for two reasons. First, the rules governing appeals, which appear in Chapter I of the Rules, do not include Rule 76.5, which appears in Chapter IV, governing administrative provisions. Second, Rule 39.5 applies only to criminal appeals; it makes no mention of original habeas proceedings, which are governed by Chapter II's Rule 56.5.

our review mechanism would no longer comply with the letter or spirit of § 2265." Defs.' May 14, 1996 Supp. Brief at 2 (emphasis in original). The Court agrees, but it also believes that defendants' concession fails to recognize the importance that Congress placed on having mandatory standards. Absent such standards, federal courts would be unable to evaluate the adequacy of a state's mechanism without examining the competency of individual counsel. Such an approach, however, would create the very type of judicial intrusiveness that Congress sought to avoid. *See* Powell Report at 3242 ("The final judgments as to the *adequacy* of any system for the appointment of counsel [ ], however, rests ultimately with the federal judiciary.... [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation." (emphasis in original); 1991 Analysis, 137 Cong.Rec. at S3222 ("The chapter would apply to such a procedure if it included appointment of counsel *meeting* articulated standards of competence") (emphasis added); *id.* at S3220.

Third, section 20(a) contains no mention of original habeas proceedings and § 20(c) requires no minimum experience whatsoever in habeas proceedings. Defendants conclusorily assert that the standards do not need to address counsel's qualifications in habeas matters, because "appellate counsel and habeas counsel are one and the same; the competency standards are thus 'unitary' as well." Defs.' 2d Opp'n at 12. Congress almost certainly did intend that the competency standards be "unitary," but such an intention undermines rather than supports defendants' claim that the state's competency standards need not consider counsel's qualifications or experience to raise "off the record" claims. The plain language of the Act evinces Congress' concern with the ability of competent counsel to address collateral claims. *See, e.g.*, § 2265(a) (The State must establish a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel in the unitary review proceedings, including expenses relating to the litigation of

collateral claims in the proceedings. The rule of court or statute must provide standards of *competency* for the appointment of *such* counsel.") (emphasis added); § 2261(b) (mechanism must provide for "competent counsel in State *post-conviction* proceedings [and] ... The rule of court or statute must provide standards of competency for the appointment of *such* counsel.") (emphasis added); *see also* 1991 Analysis, 137 Cong.Rec. at S3220 ("At a minimum, ... these states [must] focus on an[d] articulate standards of competence for such" collateral proceedings). As noted above, however, the Judicial Council promulgated and articulated the recommended standards more than four years before the California Supreme Court established the policies that require appointed counsel to pursue collateral remedies.

Finally, the Court rejects defendants' assertion that competence in criminal appeals necessarily encompasses competence in bringing habeas petitions. As Judge Godbold, of the Eleventh Circuit, has noted, "[t]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy..... [Habeas] is the most complex area of the law I deal with." "*You Don't Have To Be a Bleeding Heart," Representing Death Row: A Dialogue Between Judge Abner J. Mikvah and Judge John C. Godbold*, Human Rights, Winter 1987, at 22, 24; *see also Lonchar v. Thomas*, 116 S.Ct. 1293, L.Ed.2d 440 (1996) (recognizing the "common practice of substitution specialized capital counsel for habeas" as an essential consideration in the development of "fair and effective" habeas reform); Report of A.B.A. Task Force on Habeas Corpus Reform *reprinted in* Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 Am.U.L.Rev. 1, 71 & n. 79 (1990) (listing several sources noting the singular difficulty and complexity of habeas corpus law).

Accordingly, the Court concludes that California does not comply with § 2265(a)'s requirement that "[t]he rule of court or

statute must provide standards of competency for the appointment of such counsel."

* * * * *

DATED: /s/ 6/14/96 /s/ Thelton E. Henderson
THELTON E. HENDERSON,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUN 23 2000
CLERK

No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

TROY A. ASHMUS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND BRIEF IN OPPOSITION

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No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

TROY A. ASHMUS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Pursuant to United States Supreme Court Rule 39, Respondent Troy A. Ashmus ("respondent") hereby respectfully seeks leave to file his Brief in Opposition to the instant Petition for Writ of Certiorari without prepayment of costs, and to proceed in this matter *in forma pauperis*.

Respondent is an inmate in the California State Prison at San Quentin. Based on respondent's indigence, the United States District Court for the Northern District of California ("district court") granted respondent's request for appointment of counsel with respect to his federal Petition for Writ of Habeas Corpus on December 1, 1993. On August 9, 1995, the district court appointed Michael Laurence and Jean R. Sternberg as respondent's counsel of record pursuant to 21 U.S.C. § 848(q). On April 9, 1999, after Mr. Laurence and Ms. Sternberg became employed by the Habeas Corpus Resource Center, the district court appointed the Habeas Corpus Resource Center as counsel of record.

Because the district court appointed counsel for respondent under 21 U.S.C. § 848(q), and pursuant to Supreme Court Rule 39.1, this motion for leave to proceed *in forma pauperis* is not accompanied by an affidavit or declaration.

Dated: June 22 2000.

Respectfully submitted,

MICHAEL LAURENCE
JEAN R. STERNBERG
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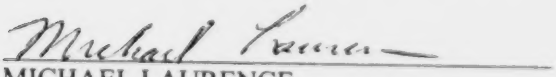

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude – as has every federal district court in the forty-six habeas proceedings to resolve the issue – that the State of California was not entitled to the expedited provisions contained in Chapter 154 of the Antiterrorism and Effective Death Penalty Act (AEDPA), because at least until 1998, when California Rule of Court 76.6 was promulgated, the State failed to fulfill the plain requirements of those provisions?

   A. Whether, prior to the 1998 adoption of Rule 76.6, the State had established, by "statute" or "rule of its court of last resort," a mechanism for the appointment of counsel in capital postconviction cases, as required by 28 U.S.C. § 2265(a)?

   B. Whether, prior to the 1998 adoption of Rule 76.6, the State had established, by "statute" or "rule of its court of last resort," standards of competency for collateral counsel as required by 28 U.S.C. § 2265(a)?

2. Did the Court of Appeals properly exercise its discretion in declining to certify questions to the state supreme court where those questions were neither determinative of the underlying petition for writ of habeas corpus nor determinative of the federal question to be resolved by the Court of Appeals?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Troy A. Ashmus ("Mr. Ashmus") respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") filed by petitioner Jeanne S. Woodford ("Warden"). The Warden has presented no compelling reasons why this Court should review the decision of the United States Court of Appeals for the Ninth Circuit in *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000), *as amended*, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Appendix to the Petition for Writ of Certiorari ("Pet. App.") 1a-22a . *See* Sup. Ct. R. 10.

STATUTES AND RULES INVOLVED

The following relevant provisions of California law were not included in the Warden's appendix, and are therefore reproduced in the Appendix attached to this Brief in Opposition ("Resp. App."): (1) Cal. Const. art. VI, § 14 (West 1996), Resp. App. 1a; (2) Cal. Gov't Code §§ 68661, 68662, 68665 (West Supp. 2000) Resp. App. 2a-5a; and (3) Cal. R. Ct.: Introduction, Rule 29.5, Rule 76.6 (West Supp. 2000), Resp. App. 6a-11a. The attached Appendix also includes the Senate Analysis of Senate Bill 513 (Cal. 1997), Resp. App. 16a-20a.

STATEMENT OF THE CASE

On March 4, 1987, the California Supreme Court appointed counsel to represent respondent Troy A. Ashmus in his "automatic appeal" from the death judgment imposed by the San Mateo County Superior Court. The California Supreme Court affirmed Mr. Ashmus' conviction and sentence on December 5, 1991. *People v. Ashmus*, 54 Cal.3d 932, 820 P.2d 214, 2 Cal. Rptr. 2d 112 (1991), *cert. denied*, 506 U.S. 841 (1992).[1] The orders specify that counsel were appointed to represent Mr. Ashmus in the automatic appeal to the California Supreme Court and do not refer to habeas proceedings or extend the appointment in the automatic appeal to include the investigation and presentation of habeas claims. Appellate counsel never filed a state habeas petition on Mr. Ashmus' behalf.

Following this Court's denial of certiorari, Mr. Ashmus instituted habeas proceedings in the United States District Court on February 17, 1993, by filing a request for the appointment of counsel and a stay of execution. The District Court appointed habeas counsel for Mr. Ashmus on December 1, 1993.

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[1] While Mr. Ashmus' rehearing petition was pending, on July 27, 1992, the California Supreme Court appointed an associate counsel in the automatic appeal.

On April 24, 1996, while the proceedings were pending in the District Court, President Clinton signed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (1996), amending provisions in Chapter 153 and creating a new Chapter 154 of the Judicial Code. 28 U.S.C. §§ 2261-2266.[2] After the enactment of the AEDPA, Mr. Ashmus commenced a separate class action lawsuit on behalf of all California death-sentenced prisoners, seeking an expeditious, uniform determination of whether California qualified for Chapter 154's benefits. The District Court enjoined State officials from attempting to secure the benefits of Chapter 154 procedures, and the Ninth Circuit affirmed. *See Ashmus v. Calderon*, 935 F. Supp. 1048, 1054-56 (N.D. Cal. 1996), *aff'd*, 123 F.3d 1199 (9th Cir. 1997). While denying the State officials' petition for writ of certiorari on the underlying merits of whether California's procedures comport with the requirements of Chapter 154, *Calderon v. Ashmus*, 522 U.S. 104 (1997), this Court ultimately reversed the Ninth Circuit, concluding that the action for declaratory judgment failed to fulfill the "case or controversy" requirement. *Calderon v. Ashmus*, 523 U.S. 740 (1998). In that decision, this Court held that the question of whether a State meets the requirements of Chapter 154 must be resolved in individual federal habeas proceedings. *Id.* at 748.

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[2] Under Chapter 154, death-sentenced prisoners in qualifying states have a period of limitations of six months following termination of state proceedings to file a federal habeas petition. 28 U.S.C. § 2263. The state may insist that the case be advanced to the front of the federal court docket, with the district court required to process and decide the case within six months of the filing of the habeas petition, and the Court of Appeals required to hear and render a decision in the case within 120 days of the filing of respondent's brief or the appellant's reply brief, whichever is later. *See* 28 U.S.C. §§ 2263(a), 2266(b)(1)(A), 2266(c)(1)(A). In addition, the provision restricts a federal court's review of the merits of constitutional claims and authority to conduct an evidentiary hearing, 28 U.S.C. § 2264, and the habeas petitioner's ability to amend a petition, 28 U.S.C. § 2266(b)(3)(B).

Thereafter, the Warden filed a motion in the District Court seeking a determination that Chapter 154 applied to this habeas proceeding.[3] In urging the District Court to apply Chapter 154, the Warden repeated the arguments that both the Court of Appeals and the District Court had rejected in the class action litigation. *See Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183-84 (N.D. Cal. 1998), Pet. App. 57a-58a. After receiving extensive briefing and oral argument, the District

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[3] The Warden filed nearly identical motions in numerous other capital habeas cases pending in the district courts. In forty-six cases, the district courts resolved the issue prior to the Ninth Circuit's decision in this case. In *every* case, the district court concluded that California does not qualify for Chapter 154's benefits. *Osband v. Calderon*, No. CIV-F-97-152 (E.D. Cal. Dec. 19, 1999); *Mitcham v. Calderon*, No. CV-97-3825 (N.D. Cal. Dec. 10, 1999); *Massie v. Calderon*, No. CV-99-2861 (N.D. Cal. Oct. 25, 1999); *Duncan v. Calderon*, No. CV-92-1403 (C.D. Cal. Sept. 30, 1999); *Mayfield v. Calderon*, No. CV 97-3742 (C.D. Cal. Sep. 10, 1999); *Wrest v. Calderon*, No. CV 95-0214 (C.D. Cal. Aug. 23, 1999); *Mattson v. Calderon*, No. CV 91-5453 (C.D. Cal. Aug. 13, 1999); *Livaditis v. Calderon*, No. CV 96-2833 (C.D. Cal. Aug. 12, 1999); *Sims v. Calderon*, No. CV 95-5267 (C.D. Cal. July 13, 1999); *Frye v. Calderon*, No. CIV S-99-0628 (E.D. Cal. June 21, 1999); *Wharton v. Calderon*, No. CV 92-3469 (C.D. Cal. June 15, 1999); *Carpenter v. Calderon*, No. C-98-2444 (N.D. Cal. June 14, 1999); *Cain v. Calderon*, No. CV 96-2584 (C.D. Cal. June 7, 1999); *Espinoza v. Calderon*, No. CIV S-94-1665 (E.D. Cal. May 24, 1999); *(Willie) Johnson v. Calderon*, No. CV 98-4043 (N.D. Cal. May 18, 1999); *Bacigalupo v. Calderon*, No. CV 94-2761 (N.D. Cal. May 12, 1999); *Alvarez v. Calderon*, No. CIV S-97-1895 (E.D. Cal. May 12, 1999); *Hawkins v. Calderon*, No. CIV S-96-1155 (E.D. Cal. May 10, 1999); *Reno v. Calderon*, No. CV 96-2768 (C.D. Cal. May 7, 1999); *DeSantis v. Calderon*, No. CIV S-93-1083 (E.D. Cal. Apr. 14, 1999); *Howard v. Calderon*, No. CIV F-93-5726 (E.D. Cal. Apr. 13, 1999); *McPeters v. Calderon*, No. CV F-95-5108 (E.D. Cal. Apr. 13, 1999); *Turner v. Calderon*, No. CIV-F-91-153 (E.D. Cal. Apr. 13, 1999); *Kirkpatrick v. Calderon*, No. CV 96-0351 (C.D. Cal. Apr. 9, 1999); *Zapien v. Calderon*, No. CV 94-1455 (C.D. Cal. Apr. 8, 1999); *Benson v. Calderon*, No. CV 94-5363 (C.D. Cal. Mar. 31, 1999); *(Noel) Jackson v. Calderon*, No. CV 97-3531 (C.D. Cal. Mar. 31, 1999); *Mickey v. Calderon*, No. C-93-0243 (N.D. Cal. Mar. 23, 1999); *Medina v. Calderon*, No. CV 94-1892 (C.D. Cal., Mar. 17, 1999); *Cummings v. Calderon*, No. CV 95-7118 (C.D. Cal. Mar. 11, 1999); *Cox v. Calderon*, No. CV 92-3370 (C.D. Cal. Mar. 11, 1999); *Bittaker v. Calderon*, No. CV 91-1643 (C.D. Cal. Feb. 17, 1999); *Proctor v. Calderon*, No. CIV S-96-1401 (E.D. Cal. Jan. 20, 1999); *Fudge v. Calderon*, No. CV 95-5369 (C.D. Cal. Jan. 6, 1999); *Crittenden v. Calderon*, No. CIV S-97-0602 (E.D. Cal. Dec. 31, 1998); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175 (N.D. Cal. Dec. 24, 1998); *Montiel v. Calderon*, No. CIV F-96-5412 (E.D. Cal. Dec. 21, 1998); *Garceau v. Calderon*, No. CIV F-95-5363 (E.D. Cal. Dec. 21, 1998); *Webster v. Calderon*, No. S-93-0306 (E.D. Cal. Dec. 18, 1998); *Ross v. Calderon*, No. CV 96-2720 (C.D. Cal. Dec. 17, 1998); *Berryman v. Calderon*, CIV F-95-5309 (E.D. Cal. Dec. 15, 1998), *Ben-Sholom v. Calderon*, No. CIV F-93-5531 (E.D. Cal. Dec. 15, 1998); *Holt v. Calderon*, No. CIV F-97-6210 (E.D. Cal. Dec. 15, 1998); *Sanchez v. Calderon*, No. CIV F-97-6134 (E.D. Cal. Dec. 15, 1998); *Stankewitz v. Calderon*, No. CIV-F-91-0616 (E.D. Cal. Dec. 15, 1998); *Morris v. Calderon*, No. CIV S-92-0483 (E.D. Cal. Dec. 2, 1998).

Court issued a comprehensive order, in which it again concluded that California did not satisfy the requirements of Chapter 154 during the time period relevant to Mr. Ashmus' case. *Id.* at 1193, Pet. App. 78a.

The District Court based this decision on four separate grounds: (1) the State did not provide for any competency standards for habeas counsel in a statute or "rule of court of last resort," *id.* at 1190-93, Pet. App. 71a-78a; (2) even if the guidelines relied on by the Warden did constitute "rule[s] of court of last resort," they did not impose binding or mandatory competency standards, *id.* at 1187-88, Pet. App. 65a-66a; (3) the State did not have an adequate mechanism for compensating counsel for the investigation and presentation of collateral habeas claims, *id.* at 1188-90, Pet. App. 67a-71a; and (4) the State has not made a bona fide offer of counsel because, although counsel has been offered to habeas petitioners, counsel has not been timely appointed, *id.* at 1186-87, Pet. App. 62a-65a; *see also Ashmus*, 935 F. Supp. at 1070-75 (same); *Ashmus v. Calderon*, 123 F.3d 1199, 1207-08 (9th Cir. 1997) (same).

In order to resolve the Chapter 154 issue for Mr. Ashmus and the other similarly situated habeas petitioners in California district courts, Mr. Ashmus stipulated to the certification of the District Court's Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). On appeal, the Ninth Circuit again affirmed the District Court, holding that "[d]uring all times relevant to this appeal, and at least until 1998, California failed to establish 'by rule of its court of last resort or by statute' a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners. California also failed to provide mandatory and binding standards of competency for collateral counsel in a 'rule of court or statute.'" *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000), *as amended*, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Pet. App. 22a. [4]

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[4] The Court of Appeals declined to rule on the other grounds cited by the District Court because the "conclusion that the State's attempt to opt-in suffers from two fatal

Following the issuance of the unanimous panel decision, the Warden sought rehearing and rehearing en banc. On March 9, 2000, the three-judge panel issued an order amending the original opinion and denying the Warden's rehearing petition. In denying the petition for rehearing en banc, the Court stated that "no judge of the court has requested a vote on the petition for rehearing en banc." *Ashmus v. Calderon*, ___ F.3d ___, 2000 WL 256627 (9th Cir. Mar. 9, 2000), Pet. App. 4a.

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deficiencies . . . makes it unnecessary to rule on these additional issues." 202 F.3d at 1165 n.8, Pet. App. 12a-13a.

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

The provisions of Chapter 154 unambiguously offer certain procedural advantages to the States in federal capital habeas corpus proceedings only if the States first meet explicit prerequisites. These explicit prerequisites include the States' adoption of a "statute" or "rule of its court of last resort" that establishes a mechanism for the appointment of counsel in state postconviction proceedings. 28 U.S.C. § 2265(a), Pet. App. 81a. In addition, "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." *Id.* The provisions of section 2265(a) – and parallel provisions in section 2261(b) – consistently have been read to mean what they say, i.e., that a qualifying mechanism *must* be established by a statute or a rule of court, that itself contains mandatory and enforceable competency standards. *See, e.g., Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997); *Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.), *cert. denied*, 519 U.S. 1002 (1996).

California did not undertake to comply with the provisions of section 2265(a) until 1998, two years after enactment of the AEDPA and section 2265(a). In that year, the State Legislature created the Habeas Corpus Resource Center and enacted California Government Code section 68662, requiring the state supreme court "to offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." Resp. App. 4a. Pursuant to Government Code section 68665, the Legislature required the State Judicial Council and the California Supreme Court to "adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Resp. App. 5a. In turn, the Judicial Council and the California Supreme Court adopted California Rule of Court 76.6, which became effective on February 27,

1998. Resp. App. 11a. The Warden concedes that at least prior to the adoption of Rule 76.6, California had no statute or rule of court that contained mandatory, enforceable standards for the appointment of postconviction counsel in capital cases. *See Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a. In fact, the Warden cannot cite *any* pre-1998 statute or rule of court that contains any form of standard – whether enforceable, wholly discretionary or otherwise – governing the appointment of counsel in postconviction capital case proceedings.

A plain reading of the terms of section 2265(a) in light of (1) the date that California first attempted to adopt a qualifying statute and court rule, and (2) the Warden's acknowledged inability to cite any pre-existing qualifying court rule or statute, reasonably should preclude any question that the Court of Appeals correctly determined that California did not comply with the requirements of section 2265(a) at least before 1998. The Warden, however, attempts to avoid this inevitable result by raising two *faux* certiorari questions.

First, the Warden represents that this case presents the question whether Chapter 154 requires states to adopt standards for the appointment of counsel "that allow no exceptions, no opportunity for departure, and no occasion for state courts to inform the application of those standards with any discretionary considerations." Petition at i, 17. Contrary to the Warden's suggestion, the Court of Appeals did not read section 2265(a) as containing any such rigid conditions. Rather, the Court of Appeals held that the appointment standards must be "binding and mandatory" provisions of a state statute or court rule, as opposed to mere "hortatory" language in policy statements that state courts are free to disregard when appointing counsel in capital cases. *Ashmus*, 202 F.3d at 1167-68, Pet. App. 17a-19a. The Warden expressly concedes that "[o]ne can plausibly read Chapter 154, as the Fifth Circuit apparently did [in *Mata v. Johnson*, 99 F.3d at 1267 & n.13], to require 'binding and mandatory' standards in the limited sense that those standards must be 'explicit' and *have the force of law*. *Id.*" Petition at 20 n.9

(Warden's emphasis). The only difference between the Ninth Circuit's reading of section 2265(a) as requiring "binding and mandatory" appointment standards and the Fifth Circuit's concededly "plausibl[e]" reading of the same requirement is the Warden's hyperbolic characterization of the former that is calculated to alarm this Court into believing there is a need to grant certiorari review.

The Warden's second ground for seeking certiorari review is premised on the belief that disputes over whether a state has qualified for expedited, Chapter 154 procedures in *federal* court present *state law* questions that should be certified to state courts for resolution. Petition at i, 26-27. The contention is directly at odds with the settled principles that federal courts are responsible for determining compliance with federal statutes, and for determining whether state procedures were sufficiently established and applied to warrant circumscribing the scope of review available to habeas corpus petitioners in federal court. *See e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Moreover, the Warden never explicitly articulates the question(s) that this Court should order the Court of Appeals to certify to the California Supreme Court, nor explains how the answer to any potential question would determine an issue in this case.

The Warden may mean to suggest that the Ninth Circuit should be directed to inquire of the California Supreme Court whether the standards for the appointment of counsel in death penalty cases that were recommended by the State Judicial Council in Section 20(c) of the Standards of Judicial Administration were ever adopted as part of a rule of court prior to 1998. *See* Petition at 10, 27-28. It is a matter of public record, however, that this question indisputably must be answered in the negative.

The Judicial Council expressly explained that the appointment standards listed in Section 20 were part of non-binding *recommendations* made pursuant to the Council's constitutional authority to "make recommendations to the courts," as distinct from its further constitutional

authority to "adopt rules for court administration." Introductory Statement, Cal. Court Rules, Vol. 23, pt. 1 at 4 (West 1996), Resp. App. 6a. The recommended standards did not appear in any rule, statement of policy or directive relating to the appointment of counsel in postconviction proceedings prior to 1998. As described above, that was the year that the California Judicial Council and the California Supreme Court promulgated Rule 76.6 in response to the State Legislature's mandate to adopt "binding and mandatory competency standards for the appointment of counsel in . . . habeas corpus proceedings." Cal. Gov't Code § 68665, Resp. App. 5a. That was the first time the Judicial Council's recommendations were elevated to the status of a rule, and made applicable to the appointment of counsel in capital postconviction proceedings.

Indeed, the Warden concedes that the state judiciary's official announcement "of rule 76.6's adoption" explained that it incorporated and expanded "the standards *previously embodied in section 20(c) of the Standards of Judicial Administration.*"[5] Petition at 24 n.10 (Warden's emphasis). Thus, if the standards had been "embodied" in an existing court rule, or if any other court rule already provided standards for the appointment of counsel in capital postconviction proceedings, it would have been unnecessary for the California Supreme Court and the Judicial Council to promulgate Rule 76.6 in order to satisfy the legislative mandate.

Under these circumstances, the effect of certifying the Warden's apparent question would be to ask the California Supreme Court if it is *still certain* that, prior to the adoption of Rule 76.6,

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[5] Nor is it true, as the Warden represents to this Court, that the standards in Section 20 "were promulgated pursuant to California Rule of Court 76.5." Petition at 4. The text of Rule 76.5, subsections (b) and (d) makes it clear that Section 20 already was in existence at the time Rule 76.5 was adopted. Pet. App. 84a-85a. Moreover, subsections (b) and (d) also make it clear that Rule 76.5 itself applies only to counsel appointed to handle direct appeals – not postconviction proceedings – in the intermediate state appellate courts, rather than the state supreme court which has original jurisdiction over capital postconviction proceedings. *See Ashmus*, 202 F.3d at 1167 & n. 12, Pet. App. 16a.

the appointment standards were embodied only in the Section 20 recommendations of the Judicial Council; or whether the 1998 adoption of Rule 76.6 was superfluous. The Court of Appeals correctly concluded that California's certified question procedure surely was not designed for such unnecessary queries.

Equally important is the fact that the Warden does not explain how any question she might chose to articulate would satisfy the requirement that "the questions may be determinative of a cause pending in the certifying court." Cal. Rules of Court, Rule 29.5(a)(2), Resp. App. 8a. Resolution of any questions regarding the applicability of Chapter 154 would not determine the "cause pending" as that phrase is understood to mean the underlying habeas corpus proceedings. Nor would any of the Warden's apparent questions, Petition at 26-28, determine the applicability of Chapter 154 to this case.

The Warden has given no reason to burden the California Supreme Court by eliciting its view of the same analysis, particularly where, as here, the answers to any imaginable questions could not determine either the cause or even an issue in the case.

ARGUMENT

I.

THE COURT OF APPEALS' INTERPRETATION OF CHAPTER 154 IS FULLY CONSISTENT WITH OTHER COURTS' INTERPRETATIONS OF THE PROVISION AND ANY READING OF CALIFORNIA'S PURPORTED MECHANISM FOR COMPLYING WITH CHAPTER 154.

The Court of Appeals concluded that prior to 1998, California failed to meet the prerequisites of Chapter 154 in three major respects:

1. At least until the adoption of California Rule of Court 76.6 in 1998, the State had no "statute" or "rule of court" that "establishes" a mechanism for appointing and compensating counsel in postconviction proceedings as required by 28 U.S.C. section 2265(a), Pet. App. 81a;

2. At least until the adoption of Rule 76.6, the State could not satisfy the requirement in section 2265(a), Pet. App. 81a, that a "rule of court or statute must provide standards of competency for the appointment" of postconviction counsel; and

3. At least until the adoption of Rule 76.6, the State had no binding or mandatory competency standards governing the appointment of counsel in capital postconviction proceedings as also required by section 2265(a), Pet. App. 81a.

Ashmus, 202 F.3d at 1165-70, Pet. App. 11a-22a.

In so holding, the Court of Appeals rejected the Warden's arguments that section "2265(a) does not actually require the appointment mechanism to be embodied in a rule of court or statute, as long as the mechanism is 'accomplished' by rule of court or statute." *Ashmus*, 202 F.3d at 1167, Pet. App. 15a. The Court of Appeals also rejected the Warden's arguments "that a qualifying state's competency standards need not be contained in a rule of court or statute," and

that the requirements of section 2265(a) may be satisfied by non-binding recommendations for counsel competency standards. *Ashmus*, 202 F.3d at 1169, Pet. App. 20a-21a.

The Court of Appeals' holding rested on a straightforward reading of Chapter 154 and the plethora of California provisions that the Warden offered in an attempt to piece together a qualifying mechanism.[6] In turn, the Court of Appeals' analysis is supported by *every* reported decision to interpret the requirements of Chapter 154, including the comprehensive analysis by the Court of Appeals in *Ashmus*, 123 F.3d 1199, as well as the district court orders in each of the forty-six capital habeas corpus cases finding that Chapter 154 does not apply to California cases.

A. CERTIORARI IS UNWARRANTED TO REVIEW THE COURT OF APPEALS' CORRECT INTERPRETATION OF THE CHAPTER 154 REQUIREMENTS

The Warden criticizes the Court of Appeals for interpreting Chapter 154 as requiring that the State's qualifying mechanism be contained in either a "statute" or "rule of its court of last resort," that the competency standards actually be contained in a rule or statute, and that such standards be "binding and mandatory." Petition at 17. The Warden cannot cite any case that conflicts with the Court of Appeals' plain reading of the statute. Nor does the Warden even acknowledge the settled principle of statutory construction that where, as here, the language of the statute is unambiguous, there is no reason to attempt to discern a contrary Congressional intent. *See Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992) ("when a statute

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[6] The Warden proffered ten disparate provisions sprinkled through California statutes, court rules, policy statements, and guidelines. More than half of these provisions pre-dated 1989, i.e., at a time when the Warden already has conceded that California did not qualify as a Chapter 154 jurisdiction. *Ashmus*, 202 F.3d at 1165, Pet. App. 12a; *see Ainsworth v. Calderon*, 138 F.3d 787, 790, *amended by* 152 F.3d 1223 (9th Cir. 1998); *McDowell v. Calderon*, 107 F.3d 1351, 1355 n. 1, *amended by* 116 F.3d 364, *vacated in part on other grounds on reh'g en banc*, 130 F.3d 833 (9th Cir. 1997), *cert. denied*, 523 U.S. 1103 (1998). As to the only four post-1989 provisions proffered by the Warden in this case, all four were internal policy and procedure guidelines of the state court, and *none* of them even *mentioned* standards for the appointment of postconviction counsel.

speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"). Yet, even if there were some arguable ambiguity in the prerequisites set forth in section 2265(a), the Warden's reading of the statute is clearly contrary to Congress' intent and the federal courts' consistent reading of Chapter 154.

In enacting Chapter 154, Congress conferred substantial procedural benefits upon qualifying States "*only if* the State meets certain conditions," designed to ensure that the state has "done its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." *Lindh v. Murphy*, 521 U.S. 320, 327, 331 (1996) (emphasis added); *see also Calderon v. Ashmus*, 523 U.S. at 723 ("If a State meets these criteria, then it may invoke Chapter 154"); *Moore v. Reynolds*, 153 F.3d 1086, 1095 (10th Cir. 1998) ("only if it satisfies the requirements" is a state entitled to the procedures in Chapter 154), *cert. denied*, 526 U.S. 1025 (1999). As the legislative history of Chapter 154 illustrates, the statute establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23, at 16 ("House Report"); *see also* 135 Cong. Rec. S13471-04, S13481 (Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report, Aug. 23, 1989 (Oct. 16, 1989)) ("Powell Committee Report").

The Congressional intent to condition Chapter 154 procedures on an enforceable right to competent counsel in state postconviction proceedings is reflected in the plain language of the statute that requires that a state's competency standards actually *be* a rule of court or statute. *Ashmus*, 202 F.3d at 1167-70, Pet. App. 17a-21a. Thus, this is the reading of the statutory language given by *every* reported decision interpreting the requirement of Chapter 154. *See, e.g., Mata v. Johnson*, 99 F.3d at 1267; *Mills v. Anderson*, 961 F. Supp. 198, 202 (S.D. Ohio 1997)

(Ohio Supreme Court Rule 65 reference to certification of counsel is insufficient for Chapter 154 compliance, as the Rule does not itself contain minimum qualifications for counsel in postconviction proceedings); *Bennett v. Angelone*, 92 F.3d at 1342 (quoting H.R. Rep. No. 23, 104th Cong., 1st. Sess.) (qualifying as a Chapter 154 jurisdiction requires a state to guarantee an enforceable "*right to counsel* for indigent capital defendants" in state postconviction proceedings) (emphasis added); *Wright v. Angelone*, 944 F. Supp. 460, 468 (E.D. Va. 1996) (right to post conviction counsel must be guaranteed by an explicit statute or a "rule of court" that establishes "a clear mechanism that can be seen and relied upon by indigent capital defendants, rather than a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations."); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) ("The Ohio process does not provide by statute or rule of the Supreme Court 'standards of competency for the appointment of [postconviction] counsel'"); *Austin v. Bell*, 927 F. Supp. 1058, 1061-62 (M.D. Tenn. 1996) ("Although Tennessee law provides for the appointment of counsel for indigent prisoners seeking habeas relief, this law insufficiently ensures the competency of such counsel.").

The Warden's criticism of the Court of Appeals' interpretation that Chapter 154 requires binding and mandatory competency standards similarly is flawed. Every federal court to consider the question has recognized that at a minimum, for a State to qualify for the expedited provisions in Chapter 154, the State must actually have enforceable rules that ensure the appointment and compensation of qualified counsel. *See Ashmus*, 123 F.3d at 1208; *Tucker v. Moore*, 56 F. Supp. 2d 611, 614 (D. S.C. 1999) (State may not invoke Chapter 154 if it fails to follow procedures set forth in qualifying mechanism); *Hill v. Butterworth*, 941 F. Supp. 1129 (N.D. Fla. 1996), *rev'd for lack of a case or controversy*, 147 F.3d 1333 (11th Cir. 1998). Because the requisite mechanism for the appointment of counsel is intended "to *ensure* that *only*

qualified, competent counsel will be appointed to represent habeas petitioners in capital cases." *Austin v. Bell*, 927 F. Supp. at 1061-62 (emphasis added), the rule of court or statute must provide "*specific*, *mandatory* standards for capital habeas counsel." *Mata v. Johnson*, 99 F.3d at 1267 (emphasis added).

Owing to the important purposes underlying Chapter 154, and the conditional nature of its central exchange, a state seeking to qualify for the benefits of Chapter 154 bears the burden of demonstrating compliance with each of the statutory requirements. *See Langford v. Day*, 110 F.3d 1380, 1386 n.2 (9th Cir. 1996) (holding Chapter 154's provisions do not apply to Montana because it did not prove it met its statutory obligations), *cert. denied*, 522 U.S. 881 (1997). Because of the severity of Chapter 154's restraints on federal review, a state satisfies the requirements of Chapter 154 only by showing strict compliance with those requirements. *See Ashmus*, 31 F. Supp. 2d at 1183, Pet. App. 56a ("the language of the qualifying procedures and the quid pro quo structure of Chapter 154 demand strict rather than substantial compliance with all preconditions"); *Weeks v. Angelone*, 4 F. Supp. 2d 497, 507 (E.D. Va. 1998) (compensation requirement only "satisfied by strict, rather than substantial compliance"); *Mills v. Anderson*, 961 F. Supp. at 201 ("neither substantial compliance nor de facto compliance is sufficient."); *Scott v. Anderson*, 958 F. Supp. 330, 332 (N.D. Ohio 1997) (same); *Breard v. Netherland*, 949 F. Supp. 1255, 1262 (E.D. Va. 1996) ("'substantial compliance' with the Act's requirements is not sufficient"), *aff'd*, 134 F.3d 615 (4th Cir.), *cert. denied*, 523 U.S. 371 (1998).

In short, the Warden offers no legal support for her view that the Court of Appeals improperly interpreted Chapter 154's requirements. Given that the Court of Appeals' interpretation of Chapter 154 mirrors that of every other federal court, this case presents no reason for certiorari review.

B. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CALIFORNIA DID NOT ESTABLISH THE REQUIRED MECHANISM BY "STATUTE" OR "RULE OF COURT" UNTIL 1998 AT THE EARLIEST

Certiorari similarly is unwarranted for this Court to review the application of Chapter 154 to the California appointment process. The actions of the California Legislature, the California State Supreme Court and the Judicial Council in mandating and adopting new Rule of Court 76.6 demonstrate that, prior to 1998, California lacked a qualifying mechanism. The legislative history of Senate Bill 513 reflects the State Legislature's acknowledgment that a qualifying mechanism was absent, and the legislative steps designed to comply with the prerequisites for Chapter 154 benefits. *See* 1997 Cal. Legis. Serv. 869 (Senate Bill 513); *see also* SB 513 Senate Analysis, Resp. App. 16a (noting that the bill "[p]rovides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures"), Resp. App. 19a (same). Pursuant to Chapter 2.1, which was added to the California Government Code, effective January 1, 1998, the Legislature created the "California Habeas Resource Center" for the purpose, *inter alia*, of providing representation to death-sentenced prisoners in "instituting and prosecuting postconviction actions in the state and federal courts." Cal. Gov't Code § 68661(a) (West Supp. 2000), Resp. App. 2a. The Legislature also mandated that "[t]he Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings," Cal. Gov't Code § 68662 (West Supp. 2000), Resp. App. 4a. In turn, the Legislature mandated that: "The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings." Cal. Gov't Code § 68665 (West Supp. 2000), Resp. App. 5a.

In response to this last enactment, the California Judicial Council and the California Supreme Court adopted new Rule of Court 76.6, effective February 27, 1998, entitled "Qualifications of Counsel in Death Penalty Appeals and Habeas Corpus Proceedings." Cal. R. Ct. 76.6, Resp. App. 11a. The provisions of new California Government Code section 68665 and new Rule of Court 76.6 constitute the first and only state statute and rule of court to provide for standards of competency for counsel appointed in capital postconviction proceedings.

The recently promulgated statutes and court rule necessarily demonstrate that, at least prior to February 27, 1998, California had not complied with the prerequisites for Chapter 154 benefits. *Cf. Gill v. Villagomez*, 140 F.3d 833, 836 (9th Cir. 1998) ("the fact that California had to amend the statute to provide a speedy trial right on remand indicates the right did not exist under" earlier versions of the statute); *see also In re Lance W.*, 37 Cal.3d 873, 887, 694 P.2d 744, 753, 210 Cal. Rptr. 631, 640 (1985) ("[t]he general rule is that courts assume from a new enactment a purpose to change existing law"); *People v. Mobley*, 72 Cal. App. 4th 761, 85 Cal. Rptr. 2d 474, 488 (Cal. Ct. App. 1999) ("[w]e presume the Legislature in amending a law 'is deemed to be aware of statutes and judicial decisions already in effect and to have enacted the new [version] in light thereof'").

1. The State Of California Had No Mechanism Created By Statute Or Rule Of Court For The Appointment Of Counsel In Habeas Proceedings Prior To 1998.

The Court of Appeals rejected the Warden's suggestion that the appointment policies outlined in the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death ("Policies") and Internal Operating Practices and Procedures ("IOPP") satisfied the clear prerequisites of section 2265(a): "Neither of these authorities is a rule of court or statute. The 1989 Supreme Court Policies, as the name suggests, are policies – not rules of court or statutes. So, too, with the IOPPs." *Ashmus*, 202 F.3d at 1165-66, Pet. App. 13a-14a.

Yet, even if these policies could be deemed to qualify as rules or statutes, they would still fail to satisfy section 2265(a) in two other major respects. First, neither the Policies nor the IOPP contain, mention, or even allude to competency standards for the appointment of counsel. Thus, irrespective of the status accorded these policy statements, they would still fail to meet the basic requirement to "*provide* standards of competency," as any qualifying rule or statute "*must*" do. 28 U.S.C. § 2265(a), Pet. App. 81a (emphasis added). Second, the Policies and IOPP are fatally contradictory on the questions of whether and when the state court would actually appoint postconviction counsel to represent a capital prisoner during the state "unitary" proceedings that prevailed in California between 1989 and 1998. *See* Petition at 3, n.1; 24, n. 10. The paradigm Congress had in mind for such jurisdictions requires the appointment and compensation of postconviction counsel "in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings." 28 U.S.C. § 2265(a), Pet. App. 81a. By contrast, the state court IOPP – even as revised after the announcement of the 1989 Policies and the enactment of Chapter 154 – did not authorize the appointment and compensation of postconviction counsel until *after* the termination of the capital appeal:

> In criminal matters, upon a verified or certified statement of indigency, the court, acting through the clerk's office, will appoint an attorney for a party in the following instances: . . . . In capital cases in the following proceedings undertaken *after the termination of the party's state appeal*: Proceedings in this court for *post-conviction* review.

IOPP, revised December 1989 (emphasis added); *see also* IOPP, revised 1995; IOPP, revised April 29, 1997.[7] Thus, putting aside the complete failure of the Polices and the IOPP even to

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[7] As revised as recently as April 29, 1997, Section XV of the IOPP stated that the court would appoint counsel for indigent defendants "[i]n capital cases in the following proceedings undertaken *after the termination of the party's state appeal*: (a) Proceedings in this court for *post-conviction* review." Following the 1998 adoption of the new Government Code Chapter 2.1 and pending adoption of new Rule of Court 76.6, the IOPP was revised to strike the foregoing language and to state that counsel would be appointed, "[i]n a pending automatic

mention competency standards, the Warden cannot seriously suggest the State created a Chapter 154 qualifying mechanism based on "rules" that simultaneously mandated the unitary processing of direct appeal and postconviction claims, but withheld appointment of postconviction counsel until the completion of the direct appeal.

The irreconcilable conflict between the Policies and the IOPP on this point is, of course, attributable to the fact that prior to 1998 neither set of administrative procedures was promulgated – nor even revised – with an eye toward complying with Chapter 154. Indeed, all of the provisions the Warden relies upon were initially adopted years before the AEDPA. These various state law provisions are merely "a loose collection of statutes and regulations which lack binding enforcement mechanisms and which may be subject to differing interpretations," *Wright*, 944 F. Supp. at 468, which the Warden ineffectively has attempted to meld into a *post hoc* mechanism to comply with Chapter 154.

The Warden does not explain what purpose would be served by granting certiorari to determine the *status* of the state court policies, when the *substance* of the policies clearly fails to satisfy the requirements of section 2265(a).

2. The State of California Had No Qualifying Competency Standards Prior to 1998

The only appointment standards the Warden can find in all of the proffered state provisions are those appearing in Section 20. The Warden, however, also has conceded that Section 20 is a "mere recommendation rather than a statute or rule of court." *Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a. Taking the Warden at her word, the Court of Appeals logically held that "the nonbinding nature of the competency standards [in Section 20] does not satisfy Chapter 154." *Ashmus*, 123 F.2d at 1208; *see also Ashmus*, 31 F. Supp. 2d at 1190 & n.29, Pet.

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appeal *and/or related state habeas corpus/executive clemency proceeding*" (emphasis added).

App. 71a-72a (adopting previous analysis that Section 20 lacks binding and mandatory standards); *Ashmus*, 935 F. Supp. at 1072-74 (discussing in detail the reasons why Section 20 does not impose any binding or mandatory standards).

The Warden appears to argue that the precatory recommendations in Section 20 are sufficient because Congress intended to afford states "wide latitude" in formulating the appointment mechanism. Petition at 21-25. The Warden's reliance on legislative history in support of her claims that Congress intended that States "retain considerable 'latitude' to fashion qualifying standards" is misplaced. Petition at 21-22 (citing 137 Cong. Rec. S3220). The *Congressional Record* section-by-section analysis referring to "latitude" afforded to the states specifically is limited to "defining specific standards of counsel competence," and does not allow states the latitude to disregard altogether the requirement of competency standards. 137 Cong. Rec. S3191-02, S3220.

Similarly, the Court of Appeals made it clear that its holding does not constrain the State's prerogatives in fashioning specific competency standards. The Court of Appeals' only concern is that, as Congress demanded, the standards must be "mandatory" rather than "hortatory." *Ashmus*, 202 F.3d at 1169 n. 18, Pet. App. 20a. Because Section 20 is a nonbinding recommendation, and "courts are *not obligated to comply* with these recommendations," Cal. R. Ct. at 1 (West 1999), Resp. App. 6a (emphasis added), it cannot satisfy the requirement that states "must have and 'apply' competency standards." *Ashmus*, 202 F.3d at 1168 n. 14, Pet. App. 18a (citing *Oken v. Nuth*, 30 F. Supp. 2d 877, 880 n. 3 (D. Md. 1998)).

The Warden's proffer of concededly inadequate and inapposite state policies serves only to underscore the point that at no time prior to the 1998 adoption of new Rule 76.6 did California provide standards of competency for the appointment of capital postconviction counsel as required by section 2265(a).

II.

THE COURT OF APPEALS PROPERLY DECLINED TO CERTIFY QUESTIONS TO THE STATE SUPREME COURT

The Warden seeks certiorari review by this Court of the question "[w]hether the court of appeals erred by failing to certify disputed state-law questions to the state supreme court." Petition at i. Yet nowhere in the Petition does the Warden identify the "disputed state law questions" that the state supreme court allegedly improperly failed to certify. The Warden's Question Presented on this issue merely states generally that the Court of Appeals erred in failing to certify certain unidentified questions to the state supreme court. *Id.* The Warden's "Statement" identifies some – but not all – of the questions as to which the Warden sought certification in her two motions below, but does not identify which of those she believes Court of Appeals improperly failed to certify. *Id.* at 10, 16. Even the Warden's argument fails to identify which questions the Warden believes the Court of Appeals should have certified to the state supreme court.[8]

The Warden's complete failure to specify the questions that she believes should have been -- and, in the future, should be – certified to the state supreme court both impedes Mr. Ashmus' ability to address this issue and obscures whatever remedy the Warden may be seeking from this Court. For this reason alone, certiorari should be denied as to the Warden's second Question Presented.

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[8] *See* Petition at 18 (Court of Appeals should be "reminded" on remand to "avail itself" of the state's certification process as to "all provisions of state law relevant to the determination of California's compliance with Chapter 154"); Petition at 26-29 (identifying what the Warden claims to be three erroneous "conclusions of California law" relied on by the court of appeals – the second of which the Warden did not even seek to certify below – but failing to identify the *questions* that should have been certified to the state supreme court).

Moreover, the Warden cannot justify this Court's review of her second question for the additional reasons that (1) the Court of Appeals, in interpreting the *federal* AEDPA statute, would not have been assisted by state court interpretations of state law; and (2) the state law questions the Warden sought to certify below were not appropriate for certification even under state rules of court, in that (a) they were neither determinative of the underlying petition for writ of habeas corpus, nor determinative of the federal question to be resolved by the Court of Appeals, and (b) they have already been decided by controlling state precedent. Because engaging in the certification process thus would have unnecessarily delayed the proceedings – already substantially delayed by the Warden's litigation and relitigation of the Chapter 154 issue – the Court of Appeals properly declined to certify the Warden's proposed questions to the state supreme court, and certiorari should be denied as to this issue.

A. A FEDERAL COURT PROPERLY EXERCISES ITS DISCRETION TO DECLINE TO CERTIFY QUESTIONS OF LAW TO A STATE COURT WHERE THE QUESTION TO BE DETERMINED BY THE FEDERAL COURT IS ONE OF FEDERAL LAW.

Certification of questions of state law to the highest courts of the states is not "obligatory," and "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).[9] The Warden's argument that the Court of Appeals abused that discretion in declining to certify certain unspecified questions to the state supreme court ignores

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[9] In determining whether to certify a question to a state court, the federal court "must consider an inevitable side effect of certification – delay." *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275-76 (5th Cir.) (also noting that where "[o]ver two and one-half years already have passed since the filing of this complaint and many preliminary questions are yet to be resolved . . . delay that is not absolutely necessary should be avoided"), *cert. denied*, 425 U.S. 829 (1976); *see also Matter of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (the "certifying court also should consider the possible delays involved"). Even if the questions posed by the Warden were appropriate for certification, the delay that would result from such a procedure is unnecessary – especially in light of the numerous opinions that uniformly reach the same conclusions as the Court of Appeals below – and militates against certification.

the basic principle that the interpretation of a federal statute, such as Chapter 154, presents a *federal* question properly decided by federal courts. *See Ashmus*, 202 F.3d at 1164 n. 6, Pet. App. 10a ("the question before this court is whether California is entitled to 'opt-in' to Chapter 154; this is manifestly a question of federal statutory interpretation").

The related issue of whether purported state rules may properly circumscribe the federally-mandated rights of federal habeas corpus petitioners is likewise a federal question to be decided by federal courts. *Cf. Johnson v. Mississippi*, 486 U.S. at 587 ("'[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question'") (quoting *Henry v. Mississippi*, 379 U.S. 443, 447 (1965)); *Ford v. Georgia*, 498 U.S. 411, 422 (1991) (whether a state procedural rule bars federal review of petitioner's claim is a federal question).[10]

As the Court of Appeals held below, this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), relied on by the Warden to support her claim that the Court of Appeals abused its discretion in declining to certify questions to the state supreme court, is inapposite. *Ashmus*, 202 F.3d at 1164 n. 6, Pet. App. 11a. In *Arizonans*, the court of appeals was charged with interpreting a *state* constitutional provision and determining whether that provision was invalid under the First Amendment of United States Constitution. *Arizonans*, 520 U.S. at 43. In that situation, "[w]hen anticipatory relief is sought in federal court *against a state statute*, respect for the place of the States in our federal system calls for close consideration of that core question." *Id.* at 75 (emphasis added); *see also id.* at 79 ("[w]arnings against premature

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[10] The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, whose report was largely codified in the AEDPA, acknowledged that "[t]he final judgments as to the adequacy of any system for the appointment of counsel . . . rests ultimately with the federal judiciary." Powell Committee Report, 45 Crim. L. Rep. (BNA) at 3242; *see also Ashmus*, 935 F. Supp. at 1057 and n.8 ("Congress . . . has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies to a given state").

adjudication of constitutional questions bear heightened attention *when a federal court is asked to invalidate a State's law*") (emphasis added).

In contrast, the Court of Appeals in this case was charged with interpreting a *federal* statute. At issue below was not the validity of the state standards, policies, and guidelines relied on by the Warden, or even an interpretation of those standards, policies and guidelines, but rather whether those standards, policies and guidelines *as promulgated* met the *federal* statutory requirements for California to receive the benefit of certain procedural advantages afforded by *federal* statute. The deference to state court decision-makers in interpreting state law called for in *Arizonans* thus is not only unwarranted, but patently inappropriate, in this case. *Cf. State of Florida ex rel Shevin v. Exxon*, 526 F.2d at 275 (in a "pure federal question case in which state law happens to be relevant in determining the issue of standing," considerations of "federal-state comity" are rendered "somewhat less persuasive").

B. THE COURT OF APPEALS PROPERLY REFUSED THE WARDEN'S ATTEMPT TO FURTHER DELAY THE PROCEEDINGS THROUGH A LENGTHY CERTIFICATION PROCESS WHERE THE WARDEN HAS DEMONSTRATED NO VALID REASON TO CERTIFY ANY PROPOSED QUESTION TO STATE COURT.

The Warden has failed to identify a single state law question, an answer to which by the state supreme court would have assisted the Court of Appeals in determining the *federal* question of whether the requirements of Chapter 154 may be applied to Mr. Ashmus' habeas petition in this case. Nor do any of the certified questions proposed by the Warden below meet the state supreme court's criteria for accepting certified questions, which require that "the questions may be determinative of a cause pending in the certifying court," and that "the decisions of the California appellate courts provide no controlling precedent concerning the certified question." Cal. R. Ct. 29.5(a), Resp. App. 8a.

As a threshold matter, as noted above, the Warden does not identify in her petition the questions she believes should have been – and, in the future, should be – certified to the state supreme court.[11] In her argument regarding her second question presented, the Warden does list three "conclusions of California law" that she claims were relied on erroneously by the Court of Appeals in reaching its decision below: (1) "[t]he California Supreme Court's Death Penalty Polices and IOPPs are not 'rules' of that court"; (2) "Rule 76.5 and § 68511.5 do not 'contemplate' appointment of collateral counsel by the California Supreme Court in capital cases"[12]; and (3) "[n]otwithstanding the California Supreme Court's demonstrated 'use' of the

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[11] In her initial Motion to Certify Questions of State Law to the California Supreme Court, the Warden sought certification of the following questions: "1. Whether any or all of the following state law measures have been adopted as 'rules of court' pursuant to California Government Code section 68070 or any other provision of law: (a) Section 20 of the Standards of Judicial Administration, (b) the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death, and (c) the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court. 2. Whether the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court violate California Penal Code section 1241." The Court of Appeals concluded that "Questions (1)(c) and (2) are no longer relevant to this appeal because we do not address the question whether California's unitary review scheme compensates collateral counsel for 'reasonable litigation expenses.'" *Ashmus*, 202 F.3d at 1164 n.6, Pet. App. 10a. The Court of Appeals declined to certify questions (1)(a) and (1)(b) because resolution of those questions would not be determinative of the cause pending before the Court of Appeal, and because they were not "novel" questions. *Id.*

In her Second Motion to Certify Questions of State Law to the California Supreme Court – filed after the Court of Appeals issued its opinion – the Warden sought certification of the following questions: "1. Whether, from 1989 to 1998, the California Supreme Court's 1989 Death Penalty Policies and IOPP constituted the exclusive sources of that Court's mechanism for the appointment of collateral counsel in capital cases. . . . 2. Whether either the Policies or the IOPP are rules of the California Supreme Court. 3. Whether Section 20 of the Standards of Judicial Administration is, or is provided by, a rule of court or statute." The Court of Appeals denied this motion without comment. Pet. App. 23a.

[12] The Warden did not seek certification by the Court of Appeals of the question of whether Rule 76.5 and Section 68511.5 contemplate appointment of collateral counsel by the California Supreme Court in capital cases. *See supra* note 11. Therefore, the Court of Appeals did not err in failing to certify this question.

Section 20 standards, the court never adopted those standards, or, if it did adopt them, it did not do so pursuant to § 68070 or any other provision of state law that would permit their adoption as rules." Petition at 26-28. Assuming that these three legal "conclusions" frame the questions as to which the Warden seeks certification, the Warden has failed to show that certification was, or is, appropriate as to these questions.

1. The Questions Of State Law That The Warden Seeks to Certify to the State Supreme Court Are Not Determinative of a Cause Pending Below.

The "cause pending" in this case, for purposes of California Rule of Court 29.5(a)(2), is Mr. Ashmus' federal petition for writ of habeas corpus.[13] Because none of the questions as to which the Warden sought certification below – all of which related to the Chapter 154 issue – would have resolved the claims of federal constitutional violations raised in Mr. Ashmus' underlying habeas corpus petition, certification was not appropriate as to *any* of these questions. *See* Cal. R. Ct. 29.5(a)(2), Resp. App. 8a (certification only proper where "the questions may be determinative of a *cause pending* in the certifying court") (emphasis added); *see also* Cal. R. Ct. 29.5(f)(2), Resp. App. 9a (in considering whether to accept request for answer to certified question, California Supreme Court may consider whether answering the question will "help terminate existing litigation").

Yet, even if the question of Chapter 154's applicability in California were deemed to be the "cause pending" for purposes of California Rule of Court 29.5(a), the certified questions

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[13] Both the California Supreme Court and the California Constitution equate "cause" with an action or proceeding, which is, in this case, Mr. Ashmus' federal habeas petition. *Cf. People v. Romero*, 8 Cal. 4th 728, 740, 883 P.2d 388, 35 Cal. Rptr. 2d 270 (1994) (the function of a writ of habeas corpus or an order to show cause in a state habeas proceeding is to "institute a proceeding in which issues of fact are to be framed and decided"; and thus the issuance of the writ or order to show cause "creates a 'cause,' thereby triggering the state constitutional requirement that the cause be resolved 'in writing with reasons stated'") (quoting Cal. Const. art. VI, § 14, Resp. App. 1a).

proposed below (and apparently proposed here) by the Warden would have been inappropriate for certification, because the state supreme court's answers to those questions would not have been determinative of that "cause."

(a) Whether the California Supreme Court considers the "standards," "policies," and "guidelines" invoked by the Warden to be "rules of court" is not determinative of whether those formulations qualify as "rules" for purposes of Chapter 154.

The Warden apparently contends that the Court of Appeals should have certified to the state supreme court the questions of whether that court considers the California Supreme Court Death Penalty Policies, IOPP, and Section 20 standards, to be "rules of court." Petition at 26-28. This argument misses the point of certification. Whether or not the California Supreme Court deems the "standards," "policies," and "guidelines" invoked by the Warden to be "rules" under *state* law, such a determination simply is not relevant to the *federal* question to be decided by this Court: whether those formulations qualify as "rules" for purposes of Chapter 154. As Mr. Ashmus explains in detail in Section I, *supra*, a state court's mere labeling of non-binding, evolving, and scattered standards, policies, and guidelines as "rules" will not bring the state under the purview of Chapter 154, and the Warden's misguided yet persistent effort to conjure a coherent "rule" from those standards, policies, and guidelines is nothing more than "post hoc rationalization." *Ashmus*, 31 F. Supp. 2d at 1189, Pet. App. 70a-71a.

(b) The California Supreme Court's interpretation of its Death Penalty Policies, IOPP, Rule 76.5, and Section 68511.5, is irrelevant to the question of whether, during the relevant period, California provided binding and mandatory standards for the appointment of collateral counsel.

State court conclusions that the California Supreme Court Death Penalty Policies and IOPP are "rules of court," and that Rule 76.5 and Section 68511.5 "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases, would have had no bearing

on the cause pending below for the additional reason that the Court of Appeals' determination that California does not qualify under Chapter 154 was limited to the grounds that California (1) "failed to establish 'by rule of its court of last resort or by statute' a mechanism for appointment and compensation of collateral counsel for its death-sentenced prisoners," *and* (2) "*failed to provide mandatory and binding standards of competency for collateral counsel in a 'rule of court or statute.*'" *Ashmus*, 202 F.3d at 1170, Pet. App. 22a (9th Cir. Mar. 9, 2000) (emphasis added). Since none of the Policies or IOPP, nor Rule 76.5, nor Section 68511.5, contains standards of competency for the appointment of counsel, and since the Warden was "forced to concede" below that Section 20 "is a mere recommendation rather than a statute or rule of court," *Ashmus*, 31 F. Supp. 2d at 1192, Pet. App. 76a, both a state court opinion that these provisions constituted "rules of court," and a state court opinion that Rule 76.5 and Section 68511.5 "contemplate" appointment of collateral counsel by the California Supreme Court in capital cases, would have been irrelevant to the Court of Appeals' decision.

(c) The proposed certified questions would not be determinative of the cause pending because regardless of whether appropriate standards were eventually adopted, *in this case* counsel was not appointed, under *any* standards, to represent Mr. Ashmus in habeas corpus proceedings during the pendency of his direct appeal.

The Warden conceded that the earliest date that California satisfied the Chapter 154 prerequisites was June 6, 1989, when the state supreme court announced its Policies Regarding Cases Arising from Judgments of Death. Petition at 3, n.1. Mr. Ashmus' state court counsel were appointed only to handle Mr. Ashmus' direct appeal in March 1987, over two years *before* the Policies were announced. As the state supreme court acknowledged, "[t]he Policies did, *for the first time*, impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus." *In re Clark*, 5 Cal.4th 750, 783, 855 P.2d 729 (1993) (emphasis added). Irrespective of whatever appointment standards the Warden may

believe governed the appointment of habeas corpus counsel at the earliest alleged compliance date of June *1989*, it is clear that such standards could not qualify California for Chapter 154 status when Mr. Ashmus' counsel were appointed to handle only the direct appeal in *1987*.

Additionally, despite the Warden's critique of virtually every aspect of the Court of Appeals' decision, she does not dispute the finding that after the state court's announcement of its 1989 Policies, Mr. Ashmus' state-appointed appeal counsel "never received orders to investigate collateral claims." *Ashmus*, 202 F.3d at 1162, Pet. App. 6a. Indeed, the state supreme court acknowledged in *Clark* that the Polices were a source of confusion regarding the nature and extent of appellate counsel's habeas corpus investigative duties. The state court sought to correct the problem by amending the Polices contemporaneously with the filing of the 1993 decision. *In re Clark*, 5 Cal.4th at 785 n.21. Accordingly, the Warden cannot show that counsel was appointed, under any standards, to represent Mr. Ashmus in habeas corpus proceedings at any time from the appointment of direct appeal counsel in 1987 until the state court affirmed Mr. Ashmus' death sentence on direct appeal in 1991.

2. The Questions Of State Law That The Warden Seeks to Certify to the State Supreme Court Have Already Been Decided By Controlling State Precedent.

The Warden's proposed questions fail to meet the standards for certification not only because they are not determinative of the cause pending below, but also because they already have been answered by controlling state precedent. *See* Cal. R. Ct. 29.5(a)(3), Resp. App. 8a (certification proper only where "the decisions of the California appellate courts provide no controlling precedent concerning the certified question"); *see also Arizonans*, 520 U.S. at 76 (certification appropriate for "novel or unsettled questions of state law"); *Lehman Bros.*, 416 U.S. at 391 (same).

By virtue of their very titles, their exclusion from the Rules of Court, and their non-binding nature, the standards, policies and guidelines relied upon by the Warden were, upon their promulgation, deemed *not* to be "rules." As the District Court observed, "California explicitly distinguishes between its rules of court and its guidelines, policies, practices, recommendations, and standards." *Ashmus*, 31 F. Supp. 2d at 1191, Pet. App. 74a; *see also id.* at 1190, n.30, Pet. App. 72a (same); *id.* at 1192, Pet. App. 76a (the Introductory Statement to the California Standards of Judicial Administration "specifically differentiates between rules of court which 'have the force of law,' and standards such as section 20, which are described as 'nonmandatory . . . recommendations on practice and procedure [expressing] goals that courts and judges are urged to try to attain, and stat[ing] guidelines for discretionary action'").

Moreover, the previous conclusions by the District Court and Court of Appeals that Section 20 is not a rule of court were confirmed in 1998 when the California Supreme Court adopted California Rule of Court 76.6. Newly enacted Government Code Section 68665 mandated that the California Supreme Court promulgate a rule of court setting forth binding and mandatory competency standards for counsel appointed in capital appeals and habeas proceedings. Resp. App. 5a. In response to this statute, the California Supreme Court did not inform the California legislature that Section 20 and/or Rule 76.5 satisfied the legislative mandate; nor did the state supreme court promulgate an additional section in the Standards of Judicial Administration Recommended by the Judicial Council (of which Section 20 is a part), which the state supreme court surely would have done if it considered Section 20 to be a "rule." Instead, the California Supreme Court and the Judicial Council promulgated *Rule of Court* 76.6. A comparison of Rule 76.6, Resp. App. 11a, with the text of Rule 76.5, Pet. App. 84a, confirms the state court's acknowledgment that until the adoption of Rule 76.6 in 1998, California had *no* rule providing standards for the appointment of counsel in capital postconviction cases.

Because the California authorities that promulgated the standards, policies and guidelines relied upon by the Warden made clear – through the act of promulgation – that they are *not* rules of court, the Court of Appeals did not abuse its discretion in declining to certify the Warden's proposed questions to the California Supreme Court.

CONCLUSION

Petitioner has failed to establish grounds for this Court to review the Circuit Court's decision. The petition for writ of certiorari should be denied.

Dated: June 23, 2000

Respectfully submitted,

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No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, ACTING WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN,
Petitioner,

v.

TROY A. ASHMUS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO
RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX A

WEST'S ANNOTATED CALIFORNIA CODES
CONSTITUTION OF THE STATE OF CALIFORNIA 1879
ARTICLE VI. JUDICIAL

§ 14. Publication of opinions; decisions of Supreme Court and courts of appeal

Sec. 14. The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

APPENDIX B

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68661. California Habeas Corpus Resource Center; creation; powers and duties

There is hereby created in the judicial branch of state government the California Habeas Corpus Resource Center, which shall have all of the following general powers and duties:

(a) To employ up to 30 attorneys who may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state, who is without counsel and who is determined by a court of competent jurisdiction to be indigent, for the purpose of instituting and prosecuting postconviction actions in the state and federal courts, challenging the legality of the judgment or sentence imposed against that person, and preparing petitions for executive clemency. Any such appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution.

(b) To seek reimbursement for representation and expenses pursuant to Section 3006A of Title 18 of the United States Code when providing representation to indigent persons in the federal courts and process those payments via the Federal Trust Fund.

(c) To work with the Supreme Court in recruiting members of the private bar to accept death penalty habeas case appointments.

(d) To establish and periodically update a roster of attorneys qualified as counsel in postconviction proceedings in capital cases.

(e) To establish and periodically update a roster of experienced investigators and experts who are qualified to assist counsel in postconviction proceedings in capital cases.

(f) To employ investigators and experts as staff to provide services to appointed counsel upon request of counsel, provided that where the provision of those services is to private counsel under appointment by the Supreme Court, those services shall be pursuant to contract between appointed counsel and the center.

(g) To provide legal or other advice or, to the extent not otherwise available, any other assistance to appointed counsel in postconviction proceedings as is appropriate where not prohibited by law.

(h) To develop a brief bank of pleadings and related materials on significant, recurring issues which arise in postconviction proceedings in capital cases and to make those briefs available to appointed counsel.

(i) To evaluate cases and recommend assignment by the court of appropriate attorneys.

(j) To provide assistance and case progress monitoring as needed.

(k) To timely review case billings and recommend compensation of members of the private bar to the court.

(l) The center shall annually report to the Legislature, the Governor, and the Supreme Court on the status of the appointment of counsel for indigent prisoners in postconviction capital cases, and on the operations of the office. On or before January 1, 2000, the office of the Legislative Analyst shall evaluate the available reports.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68662. State prisoners subject to capital sentences; appointment of counsel for postconviction proceedings

The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:

(a) The appointment of one or more counsel to represent the prisoner in postconviction state proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.

(b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.

(c) The denial to appoint counsel upon a finding that the person is not indigent.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2.3. CALIFORNIA HABEAS RESOURCE CENTER

§ 68665. Appointment of counsel; binding and mandatory competency standards

The Judicial Council and the Supreme Court shall adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

APPENDIX C

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT

INTRODUCTORY STATEMENT

[Adopted effective Jan. 1, 1992.]

The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice.

Judicial Council rules, standards, and orders

Unless otherwise indicated, each rule in these California Rules of Court was adopted by the Judicial Council under its constitutional authority to "adopt rules for court administration, practice and procedure not inconsistent with statute," or under express authority granted by the Legislature.

Throughout the rules, "shall" is mandatory, "may" is permissive, and "should" indicates a nonbinding recommendation unless the context or subject matter requires otherwise.

All of the California Rules of Court have the force of law.

Under its authority granted by article VI, section 6, of the Constitution to "make recommendations to the courts," the Judicial Council has adopted "Standards of Judicial Administration Recommended by the Judicial Council" ("standards"). They are published in Division I of the Appendix to the California Rules of Court.

The nonmandatory nature of the standards is indicated by the use of "should" instead of the mandatory "shall."

Standards make recommendations on practice and procedure, express goals that courts and judges are urged to try to attain, and state guidelines for discretionary action. Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them as highly desirable standards of good practice.

A standard might also be found by a court to state the proper boundaries of judicial discretion.

The Judicial Council sometimes disposes of matters within its jurisdiction by orders that are not incorporated into the rules; for example, it might name the counties to participate in a pilot project by order.

The Chief Justice, as Chair of the Judicial Council, is given certain express powers by article VI, section 6, and by statute. For example, article VI, section 6, authorizes the Chief Justice to prescribe the reports courts make to the Judicial Council. This is done by regulations, which have the force of law.

This Introductory Statement is intended to clarify the usual meaning and intent of rules, standards, and orders, and to distinguish among them. It is not intended to be exhaustive or exclusive, and the distinctions expressed here do not bind the Judicial Council in the future.

Judicial Council forms

The Judicial Council may adopt forms in either of two ways.

Under Government Code section 68511, it may "prescribe" certain forms. Use of those forms is mandatory.

The council may also "approve" forms. Use of an approved form is not mandatory, but the form must be accepted by all courts in appropriate cases (rule 982(b)).

Forms thus are "adopted" for mandatory use and "approved" for optional use. The lower left corner of the first page of each form indicates whether the Judicial Council adopted or approved the form. Local rules of many courts make the use of some optional council forms mandatory in those courts.

A form adopted or approved by the council is not subject to the requirements of rules 201 and 501, which specify the format of papers filed in superior and municipal courts, respectively.

A party may file a "duplicate" of a council form produced entirely by computer (rule 982(e), (f)).

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES RELATING TO THE SUPREME COURT AND COURTS OF APPEAL
CHAPTER I. RULES ON APPEAL
PART IV. HEARING AND DETERMINATION OF APPEAL

Rule 29.5. Questions of state law certified by federal appellate courts and other courts

(a) [Requirements for certified questions] The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:

(1) the certifying court requests the answer;

(2) the questions may be determinative of a cause pending in the certifying court; and

(3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.

(b) [Contents of certification request] Only a court specified in subdivision (a) may certify a question. The request shall be by an order that sets forth:

(1) the caption of the case, including names and addresses of counsel and of parties appearing pro se, and a designation of the party to be deemed the petitioner on the certified question if the request to answer is granted;

(2) the questions of law to be answered;

(3) a statement (by stipulation of the parties subject to approval by the certifying court, or by the court itself) of all facts relevant to the certified question, and showing fully the nature of the controversy and the circumstances in which the question arose;

(4) statements (i) demonstrating that the question certified is contested and that there is no controlling precedent in the case law of the California appellate courts; (ii) explaining how an authoritative answer to the certified question may be determinative of a cause pending in the certifying court; and (iii) indicating that the answer provided by the California Supreme Court will be followed by the certifying court; and

(5) such additional information as the certifying court may deem relevant and useful.

(c) [Briefs and other materials] The certifying court shall furnish legible copies of all relevant briefs to the California Supreme Court with the request for an answer to the certified question. The California Supreme Court may request that the certifying court furnish additional material, such as exhibits or all or a portion of the record that, in the opinion of the court, may be useful in answering the certified question.

(d) [Request procedure] The judge or justice presiding at the certification hearing (if any)--or the presiding judge or justice of the court or panel certifying the question--shall sign the request for an answer to the certified question. The clerk of the certifying court shall forward the request under its official seal to the California Supreme Court with a certificate that the clerk has served the request on the parties.

(e) [Supporting or opposing the request]

(1) Within 20 days after the request for an answer to a certified question is filed in the California Supreme Court, a party may file a brief supporting or opposing the request.

(2) The brief may request that the California Supreme Court restate the certified question under subdivision (g). If a brief makes that request, it shall state a proposed restatement of the question at the beginning of the body of the brief.

(3) The brief shall state on its cover whether the brief supports or opposes the request and whether it requests restatement of the question.

(4) A party may reply to another party's brief within 10 days after the brief is filed.

(5) A brief or reply shall be served on each party and on the requesting court.

(f) [Factors that may be considered] The California Supreme Court shall have discretion to accept or deny the request for an answer to the certified question of law. In exercising its discretion the court may consider:

(1) factors that it ordinarily considers in deciding whether to grant review of a decision of a California Court of Appeal or to issue an alternative writ or other order in an original matter;

(2) comity, and whether answering the question will facilitate the certifying court's functioning or help terminate existing litigation;

(3) the extent to which an answer would turn on questions of fact; and

(4) any other factors the court may deem appropriate.

(g) [Clarification of question] At any time, the California Supreme Court may restate the certified question or may ask the certifying court to restate or clarify the certified question.

(h) [Order denying or accepting request] The California Supreme Court shall issue an order accepting or denying the request for an answer to the certified question. If the court accepts the request, it shall announce that determination in the manner that it announces the acceptance of cases for review, and thereafter:

(1) the California Rules of Court for briefing, argument, and conduct of appeals shall

govern further proceedings on any certified question unless the court or the Judicial Council otherwise provides;

(2) fees and costs shall be the same as in appeals docketed before the California Supreme Court and, in civil matters, shall be equally divided between or among the parties unless the certifying court in its request for an answer to the certified question provides for a different allocation, or the California Supreme Court provides otherwise; and

(3) the California Supreme Court may in its discretion assign a certified question such priority on its docket as considerations of fairness, exigency, and comity may require.

(i) [Notice to California Attorney General] If the certified question concerns the proper interpretation of a California statute, in litigation in which the State of California or an officer, agency, or employee of the state is not a party, the clerk of the California Supreme Court shall notify the California Attorney General and the California Supreme Court may permit him or her to file briefs on the issue.

(j) [Transmission of opinion] The clerk shall forward the California Supreme Court's written opinion stating the law governing the certified question to the certifying court, under the seal of the Supreme Court, and also shall forward copies of the opinion to counsel of record.

(k) [Publication and precedential effect] The California Supreme Court's answer to a certified question shall have the same authoritative and precedential force as any other decision of the court, and shall be published in the Official Reports.

(l) [Procedural rules] The California Supreme Court or the Judicial Council may adopt procedures governing practice under this rule.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES RELATING TO THE SUPREME COURT AND COURTS OF APPEAL
CHAPTER IV. ADMINISTRATIVE PROVISIONS GOVERNING REVIEWING COURTS

Rule 76.6. Qualifications of counsel in death penalty appeals and habeas corpus proceedings

(a) [Purpose] The purpose of this rule is to define minimum qualifications for attorneys appointed to represent persons in the Supreme Court in death penalty appeals and habeas corpus proceedings related to sentences of death. An attorney is not entitled to appointment simply because the minimum qualifications are met.

(b) [General qualifications] The Supreme Court shall appoint an attorney only if, after reviewing the attorney's experience, writing samples, references, and evaluations as set forth in subdivisions (d) through (f), the court determines that the attorney has demonstrated the commitment, knowledge, and skills necessary to competently represent the defendant. An attorney appointed under this rule must be willing to cooperate with an assisting counsel or entity as may be designated by the court.

(c) [Definitions] The following definitions apply:

(1) "Appointed counsel" means an attorney appointed by the Supreme Court to represent a person in a death penalty appeal or death penalty related habeas corpus proceedings in the Supreme Court. Appointed counsel may be either lead counsel or associate counsel.

(2) "Lead counsel" means an appointed attorney or an attorney in the Office of the State Public Defender, the California Habeas Resource Center, or the California Appellate Project, who is responsible for the overall conduct of the case and for supervising the work of associate and supervised counsel. Whenever more than one attorney is appointed to represent a defendant jointly in a death penalty appeal, in death penalty related habeas corpus proceedings in the Supreme Court, or in both classes of proceedings together, one such attorney shall be designated as lead counsel.

(3) "Associate counsel" means an attorney appointed by the Supreme Court who does not have the primary responsibility for the case. Associate counsel must meet the same minimum qualifications as lead counsel.

(4) "Supervised counsel" means an attorney who works under the immediate supervision and direction of lead or associate counsel, but is not appointed by the Supreme Court. Supervised counsel must be an active member of the State Bar of California.

(5) "Assisting counsel or entity" means an attorney or entity designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Entities that may be designated in this capacity include, as appropriate, the Office of

the State Public Defender, the California Habeas Resource Center, and the California Appellate Project.

(d) [Qualifications for appointed appellate counsel] An attorney appointed to represent a person in the Supreme Court in a death penalty appeal, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in seven completed felony appeals, including one murder; or

(B) Counsel of record for a defendant in five completed felony appeals and supervised counsel for a defendant in two death penalty appeals in which the opening brief has been filed. Service as supervised counsel in a death penalty appeal shall apply toward the minimum qualification described in this subdivision (d)(2)(B) only if lead or associate counsel in that appeal attests that the supervised attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the Supreme Court, including those specifically related to death penalty appeals;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense training, continuing education, or course of study, at least six hours of which involve death penalty appeals. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, and advocacy, taking into consideration:

(A) Two writing samples, ordinarily appellate briefs, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(e) [Qualifications for appointed habeas corpus counsel] An attorney appointed to represent a person in the Supreme Court in death penalty related habeas corpus proceedings, as either lead or associate counsel, must have at least the following qualifications and experience:

(1) Active practice of law in California for at least four years;

(2) Either:

(A) Counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder, and counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or

(B) Counsel of record for a defendant in five completed felony appeals or writ proceedings and supervised counsel in two Supreme Court death penalty related habeas corpus proceedings in which the petition has been filed. Service as supervised counsel in a Supreme Court death penalty related habeas corpus proceeding shall apply toward the minimum qualifications described in this subdivision (e)(2)(B) only if lead or associate counsel in that proceeding attests that the attorney has performed a significant portion of work on the case and recommends the attorney for appointment;

(3) Familiarity with the practices and procedures of the California Supreme Court and the federal courts in death penalty habeas corpus proceedings;

(4) Within three years before appointment, completion of at least nine hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which involve death penalty habeas corpus proceedings. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement; and

(5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy, taking into consideration:

(A) Three writing samples, ordinarily two appellate briefs and one habeas corpus petition, written by the attorney and involving analysis of complex legal issues;

(B) If the attorney has been appointed previously in a death penalty appeal or death penalty related habeas corpus proceeding in the Supreme Court, the evaluation of the assisting counsel or entity in that proceeding;

(C) Recommendations from two attorneys familiar with the attorney's qualifications and performance; and

(D) If the attorney is on a panel of attorneys eligible for appointments to represent indigent appellants in the Court of Appeal, the evaluation of the administrator responsible for those appointments.

(f) [Alternative qualifications] The Supreme Court may appoint an attorney who does not meet the requirements of subdivisions (d)(1) and (d)(2) or (e)(1) and (e)(2) of this rule if the attorney has the qualifications described in subdivisions (d)(3) through (d)(5) or (e)(3) through (e)(5) and:

(1) The court finds that the attorney has extensive experience in another jurisdiction or a different type of practice (such as civil trials or appeals, academic work, or work for a court or prosecutor) for at least four years, such that the attorney has substantially equivalent experience in complex cases as an attorney qualified under subdivision (d) or (e);

(2) Ongoing consultation is available to the attorney from an assisting counsel or entity designated by the court; and

(3) Within two years before appointment, the attorney has completed at least 18 hours of Supreme Court-approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least nine hours of which involve death penalty appellate or habeas corpus proceedings. The Supreme Court shall determine in each case whether the training, education, or course of study completed by a particular attorney satisfies the requirements of this subdivision in light of his or her individual background and experience. If the Supreme Court previously has appointed counsel to represent a defendant in a death penalty appeal or a related habeas corpus proceeding, and counsel has provided active representation within three years prior to the request for a new appointment, the court, upon review of counsel's previous work, may find that such representation constitutes compliance with this training requirement.

(g) [Attorneys without trial experience] If an attorney appointed under either subdivision (e) or subdivision (f) to represent a defendant in death penalty related habeas corpus proceedings in the Supreme Court does not have experience in conducting trials or evidentiary hearings, the attorney must associate an attorney who has such experience if an evidentiary hearing is ordered in the habeas corpus proceeding.

(h) [Use of supervised counsel] An attorney who does not meet the qualifications described in subdivisions (d), (e), or (f) may assist lead or associate counsel, but must work under the immediate supervision and direction of lead or associate counsel.

(i) [Dual appointment] An attorney appointed to represent a defendant in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court must

meet the minimum qualifications of both subdivisions (d) and (e), or of subdivision (f). Notwithstanding the foregoing, two attorneys together may be eligible for appointment to represent a defendant jointly in both a death penalty appeal and death penalty related habeas corpus proceedings in the Supreme Court if the Supreme Court finds that their qualifications in the aggregate satisfy the provisions of both subdivisions (d) and (e), or of subdivision (f).

(j) [Designated entities as appointed counsel] Notwithstanding any other provision of this rule, the State Public Defender is qualified and eligible to serve as appointed counsel in death penalty appeals, the California Habeas Resource Center is qualified and eligible to serve as appointed counsel in death penalty related habeas corpus proceedings in the Supreme Court, and the California Appellate Project is qualified and eligible to serve as appointed counsel in both classes of proceedings. When serving as appointed counsel in a death penalty appeal, the State Public Defender or the California Appellate Project shall not assign any attorney as lead counsel in the appeal unless it finds the attorney has the qualifications described in subdivisions (d)(1) through (d)(5) or the Supreme Court finds the attorney to qualify under subdivision (f). When serving as appointed counsel in a death penalty related habeas corpus proceeding in the Supreme Court, the California Habeas Resource Center or the California Appellate Project shall not assign any attorney as lead counsel in the proceeding unless it finds the attorney has the qualifications described in subdivisions (e)(1) through (e)(5) or the Supreme Court finds the attorney to qualify under subdivision (f).

(k) [Attorney appointed by federal court] Notwithstanding any other provision of this rule, the Supreme Court may appoint an attorney who is under appointment by a federal court in a death penalty related habeas corpus proceeding for the purpose of exhausting state remedies in the Supreme Court and for all subsequent state proceedings in that case, if the Supreme Court finds the attorney has the commitment, proficiency and knowledge necessary to represent the defendant competently in state proceedings.

APPENDIX D

SENATE THIRD READING
SB 513 (Lockyer)
As Amended September 10, 197
Majority-vote

SENATE VOTE : Vote no relevant

PUBLIC SAFETY APPROPRIATIONS
Vote not relevant Vote not relevant

SUMMARY: Provides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures. Specifically, this bill :
1) Creates the California Habeas Resource Center (center) in the Judicial Branch to represent indigent death row inmates in habeas corpus proceedings. In particular:

a) States that the center shall be managed by an executive director who shall be confirmed by the Senate and appointed by an unpaid board with a four-year term chosen by the five indigent appellate projects.

b) Provides that the executive director shall have the same qualifications as the State Public Defender - five years (minimum) membership in the State Bar and substantial experience in criminal defense;

c) Allows the center to employ up to 30 attorneys who may be appointed by the Supreme Court to represent capital defendants;

d) Authorizes employment of investigators for habeas petitions and hearings, and allows contracts with appointed private counsel for use of investigation services;

e) Authorizes the Supreme Court to raise allowable initial investigation expenses from $12,000 to $25,000 per case;

f) Directs the center to maintain a roster of qualified private attorneys for appointments in direct appeals and habeas petitions;

g) Directs the center to provide assistance to appointed attorneys and to review case billings submitted by private attorneys;

h) Authorizes the center to seek reimbursement from the federal courts for representation of capital habeas petitioners in federal courts.

2) Gives the California Supreme Court discretion to raise the hourly rate in capital appeals and habeas proceedings to at least $125 per allowable hour, based upon established guidelines for complexity of issue and length of record, but also allows the court to pay attorneys on a flat-fee basis (also based upon similar established guidelines).

3) Directs the Judicial Council, and the Supreme Court to establish binding qualifications for attorneys in capital cases.

4) Restricts appointments to the Office of the State Public Defender (OSPD) to direct appeals in capital cases, with exceptions for training or where capital duties have been met.

5) Authorizes the OSPD to hire an additional 15 attorneys and adequate support staff.

EXISTING LAW :

1) Provides, in Supreme Court standards, that the hourly payment to a private attorney appointed by the Court in a capital appeal or post-conviction proceeding is $98, or a fixed fee based upon expected usual or average allowable hours for comparable cases.

2) Authorizes the OSPD to represent a defendant in any appeal or proceeding after a sentence of death, a defendant in an appeal or extraordinary writ a state prison inmate charged with a crime when the local public defender has refused appointment, or any other defendant entitled to representation at public expense.

FISCAL EFFECT : Unknown

COMMENTS :

1) According to the author, "Currently, there are over 150 inmates on death row for whom no counsel has been appointed, either for purposes of the direct appeal or state habeas proceedings. Under existing law, the Office of the State Public Defender or private counsel recruited by the Supreme Court's Automatic Appeals Monitor are assigned death penalty cases. The State Public Defender is currently stretched as far as her budget will allow and many qualified private counsel are unwilling to accept new cases because of the low rate of compensation authorized by the Supreme Court."
2) The prior votes on this bill are not relevant as the entire contents of the bill has been deleted.

Analysis prepared by : Jerome McGuire / apubs / (916) 445-3268

SENATE RULES COMMITTEE
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SB 513

UNFINISHED BUSINESS

Bill No: SB 513
Author: Lockyer (D)
Amended: 9/10/97
Vote: 21

All Senate Votes Not Relevant

ASSEMBLY FLOOR : Not Available

SUBJECT : Appellate representation: California Habeas Resource Center

SOURCE : Author

DIGEST : This is a new bill. As it left the Senate, this bill, by Senator Hayden, made it unlawful to purchase more than one pistol, revolver, or other firearm capable of being concealed upon the person within any 30-day period, punishable by a misdemeanor penalty. The above provisions and the author were deleted in the Assembly.

Assembly Amendments provide for legal representation of indigent death row inmates. This bill would also create the California Habeas Resource Center to represent indigent death row inmates.

NOTE: This bill is essentially the same as the Conference Report on SB 1088 (Lockyer) to the issue of creating the California Habeas Resource Center. This version is essentially the same as that section in SB 1088, with technical amendments requested by the Governor.

ANALYSIS : Existing law provides, in Supreme Court standards, that the hourly payment to a private attorney appointed by the Court in a capital appeal or post-conviction proceeding is $98, or a fixed fee based upon expected usual or average allowable hours for comparable cases.

Existing law authorizes the OSPD to represent a defendant in any appeal or proceeding after a sentence of death, a

defendant in an appeal or extraordinary writ a state prison inmate charged with a crime when the local public defender has refused appointment, or any other defendant entitled to representation at public expense.

This bill provides for legal representation of indigent death row inmates to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures. Specifically, this bill:

1. Creates the California Habeas Resource Center (center) in the Judicial Branch to represent indigent death row inmates in habeas corpus proceedings. In particular:

   A. States that the center shall be managed by an executive director who shall be confirmed by the Senate and appointed by an unpaid board with a four-year term chosen by the five indigent appellate projects.

   b. Provides that the executive director shall have the same qualifications as the State Public Defender: five years' (minimum) membership in the State Bar and substantial experience in criminal defense.

   C. Allows the center to employ up to 30 attorneys who may be appointed by the Supreme Court to represent capital defendants.

   D. Authorizes employment of investigators for habeas petitions and hearings, and allows contracts with appointed private counsel for use of investigation services.

   E. Authorizes the Supreme Court to raise allowable initial investigation expenses from $12,000 to $25,000 per case.

   F. Directs the center to maintain a roster of qualified private attorneys for appointments in direct appeals and habeas petitions.

   G. Directs the center to provide assistance to appointed attorneys and to review case billings submitted by private attorneys.

   H. Authorizes the center to seek reimbursement from the federal courts for representation of capital habeas petitioners in federal courts.

2. Gives the California Supreme Court discretion to raise the hourly rate in capital appeals and habeas proceedings to at least $125 per allowable hour, based upon established guidelines for complexity of issue and length of record, but also allows the court to pay attorneys on a flat-fee basis (also based upon similar established guidelines).

3. Directs the Judicial Council, and the Supreme Court to establish binding qualifications for attorneys in capital cases.

4. Restricts appointments to the Office of the State Public Defender (OSPD) to direct appeals in capital cases, with exceptions for training or where capital duties have been met.

5. Authorizes the OSPD to hire an additional 15 attorneys and adequate support staff.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT : (Verified 9/11/97)

The Administration
Judicial Council
California State Public defenders Association

ARGUMENTS IN SUPPORT : According to the author's office, "Currently, there are over 150 inmates on death row for whom no counsel has been appointed, either for purposes of the direct appeal or state habeas proceedings. Under existing law, the Office of the State Public Defender or private counsel recruited by the Supreme Court's Automatic Appeals Monitor are assigned death penalty cases. The State Public Defender is currently stretched as far as her budget will allow and many qualified private counsel are unwilling to accept new cases because of the low rate of compensation authorized by the Supreme Court."

RJG:ctl 9/12/97 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****

(3) COPY

Supreme Court, U.S.
FILED
JUN 03 2000
CLERK

No. 99-1720

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE S. WOODFORD, WARDEN
OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, PETITIONER

v.

TROY A. ASHMUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Antiterrorism and Effective Death Penalty Act of 1996
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Cal. Sup. Ct., Internal Operating Practices and Procedures (IOPPs) 6, 9

Miscellaneous:

American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 1989) 3

Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Powell Committee Report (1989), 135 Cong. Rec. at S13483 1
Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991, 137 Cong. Rec. at S3220 6

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REPLY BRIEF FOR THE PETITIONER

Respondent does not dispute that securing a prompt and authoritative construction of Chapter 154's compliance criteria is a matter of great importance to virtually every capital jurisdiction and death-sentenced prisoner in the Nation. Nor does respondent identify any reason why this is not an appropriate case in which to supply the necessary guidance. Instead, respondent opposes review primarily on the ground that the Ninth Circuit's decision is correct. For reasons stated below and in the petition, respondent's defense of the court's decision is wholly unpersuasive. But even if the nature and extent of the Ninth Circuit's errors were less clear, review would be warranted to ensure that state and federal habeas processes alike may be expeditiously reformed and improved nationwide in accordance with Congress's design for "ensuring fairness and protecting the constitutional rights of capital litigants." Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report (Aug. 23, 1989), 135 Cong. Rec. at S13482.

1. a. The issue of greatest and most immediate national importance presented by this case concerns the proper construction of 28 U.S.C. §§ 2261(b) and 2265(a), wherein Congress encouraged states authorizing capital punishment to provide "standards of competency for the appointment of [collateral] counsel" by rule of court or statute. See Pet. App. 79a, 81a. By insisting that qualifying state standards must be "binding and mandatory," respondent argues that he is only reading the provisions of Chapter 154 "to mean what they say." Br. in Opp. 7. The first problem with this submission, of course, is that Chapter 154 says nothing about state standards being "binding and mandatory."[1/] Even the Ninth Circuit recognized as much, characterizing this additional "requirement" as something Congress "implicitly included." Such an "implication," in turn, rests on the assumption that Congress feared state standards would be "eviscerated" if their application was "left to the discretion of a [state] court" and federal courts would then be required to undertake "a case-by-case analysis to determine whether a state is entitled to the benefits of Chapter 154." Pet. App. 17a-18a. As we explained in the petition, this train of reasoning is flawed from premises to conclusion, and

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1. Respondent also offers a defense of the Ninth Circuit's view that in order to "provide" standards, the state's rule or statute must "itself contain[]" the standards (rather than authorize or direct their promulgation in some other valid instrument of state law). Br. in Opp. 14-15. As we explained in the petition, however, because California's standards *are* "contained in" Section 20 of the Standards of Judicial Administration and the Section 20 standards *have* been adopted as a rule by the California Supreme Court pursuant to California Government Code section 68070, it is unnecessary to consider whether those same standards were "provided" by Government Code section 68511.5 (directing the promulgation of rules regulating the appointment of counsel and establishing procedures therefor, with consideration for *inter alia* "the need to match the skills and experience of the attorney with the demands of the case," Pet. App. 83a) and California Rule of Court 76.5 (adopted eff. Jan. 1, 1985) (requiring the establishment of counsel appointment lists with explicit reference to the Section 20 guidelines (also adopted eff. Jan. 1, 1985), Pet. App. 84a, 86a); see State C.A. Br. Adden. 11, 14. Accordingly, we explicitly have not sought review of that question. Pet. 27-28 nn. 12-13.

even respondent makes little effort to defend it on its own terms. Instead, he denies that the Ninth Circuit's construction of Chapter 154 imposes any "rigid conditions" on the form and operation of state competency standards. Qualifying standards, he assures this Court, need be "mandatory" only in the sense that they must not be "hortatory." Under this proposed reading, qualifying states may inform their application of counsel standards with discretionary considerations, just so long as, ultimately, the states are "obligated to comply" with the standards; likewise, states may forge exceptions to, and authorize judicial departure from, their standards, but state courts cannot be left "free to disregard" them. Br. in Opp. 8-9, 21.

The distinctions petitioner hopes to ascribe to the Ninth Circuit find little expression of support in the decision of that court. See, *e.g.*, Pet. App. 17a ("The requirement of competent counsel . . . would be eviscerated if the decision to follow the standards were left to the discretion of a court"). In all events, the distinctions themselves will prove utterly useless to any state that attempts to achieve compliance, as well as to any court that is called upon to resolve the question. Indeed, the purported distinctions are wholly illusory, as an examination of relevant provisions of state and federal law immediately reveals: 21 U.S.C. § 848(q)(7), for example, leaves federal courts "free to disregard" the competency standards for capital counsel prescribed in section 848(q)(6), yet not even respondent suggests that federal law "fails to provide" standards. See Pet. App. 95a-96a. Although these and similarly instructive provisions of federal law were identified and discussed in our petition, respondent altogether ignores them in his opposition. Similarly, he refuses to acknowledge that the American Bar Association's recommended competency standards—some adaptation of which now serves as the statutory model for the majority of states seeking to achieve Chapter 154 compliance, see Pet. App. 96a-172a—also permit appointment of counsel who fail to meet the standards specified so long as "it is clearly established to the appointing authority that competent represen-

tation will be provided." Pet. App. 116a, 125a-126a. Thus, there is nothing "hyperbolic" (Br. in Opp. 9) about our observation that the Ninth Circuit's construction of Chapter 154 severely undermines any prospect that the quid pro quo envisioned by Congress will be honored in Kansas, Idaho, Oregon, New York, Washington, Arizona, Mississippi, Maryland, Nevada, Ohio, South Carolina, Arkansas, and California. Respondent's complete refusal to address the nationwide implications of the Ninth Circuit's construction of Chapter 154 places the breadth and gravity of that court's misanalysis beyond serious dispute.

Respondent's suggestion (Br. in Opp. 9) that the Ninth Circuit's reading of Chapter 154 comports with the Fifth Circuit's in *Mata v. Johnson*, 99 F.3d 1261 (1966), *vacated in part on other grounds*, 105 F.3d 209 (1997), is unavailing. *Mata* stands for the unremarkable proposition that qualifying state standards must be "explicit" and have "the force of [state] law." In no manner does it support the conclusion that they must also be "binding and mandatory" in the peculiar sense conceived by the Ninth Circuit. Texas had *no written standards whatsoever*, and thus failed to qualify. California's standards, by contrast, are nothing if not "explicit"—they are set forth in Section 20. And whether Section 20 enjoys the "force of law" (i.e., whether it is "mandatory" in the sense that the Fifth Circuit used that term) is the precise question of state law that respondent has so studiously resisted, and the Ninth Circuit has twice refused, certification to the California Supreme Court.

Respondent's own Brief in Opposition demonstrates that the Section 20 standards' status as "rules" under California law is an issue at the center of this dispute. In service of his desire not to have that question addressed by the only tribunal capable of doing so authoritatively, respondent tells this Court three times that petitioner "has conceded that section 20 is a 'mere recommendation rather than a statute or a rule of court.'" Br. in Opp. 20; *id.* at 8, 29. Elsewhere, he argues that the Section 20 Standards' character as rules under state law "is irrelevant"

because possessing that status would not qualify them "as 'rules' *for purposes of Chapter 154.*" *Id.* at 28 (emphasis added).

Petitioner, of course, never issued the concession respondent attributes to her, and such a concession would be directly contrary to the position petitioner has consistently held and expressed throughout these proceedings. See Record, Doc. No. 236 (State's Supp. Mem. re Applicability of Chapter 154) at 16-17 ("[T]he [Section 20] standards themselves, while originally presented as 'recommendations,' *have been adopted by the California Supreme Court as 'rules'* relating to that Court's internal operation and governance" (emphasis added) (citing Cal. Gov't Code § 68070)). Nor, contrary to respondent's statements made in opposition to this petition (Br. in Opp. 20), did the Ninth Circuit ever credit petitioner with making such a concession. Compare Pet. App. 39a-40a (circuit court decision) ("The State contends that section 20 is a rule of court . . . ." and "The State . . . claims that section 20 has become . . . a rule of court . . . because it has been adopted by the California Supreme Court . . . .") with Pet. App. 76a (district court opinion) (citing Record, Doc. No. 236, at 16-17 (quoted in relevant part, *supra*)).

The notion that a provision could constitute a "rule" of the California Supreme Court as a matter of *California* law yet somehow fail to be a "rule of [California's] court of last resort" "for purposes of Chapter 154" is nonsensical.

b. Respondent does not directly dispute our observation that all death-sentenced prisoners in California enjoy a state-law right to collateral counsel, and he appears to concede that creation of such a guarantee by rule or statute will suffice to demonstrate that a state has "established [an appointment] mechanism" within the contemplation of Chapter 154. See Br. in Opp. 15; accord, State C.A. Br. 44 ("[E]stablishment' of a state's mechanism [must be] accomplished by rule or statute"). He maintains, however, that this right "did not exist" in California until the enactment of California Government Code section 68661 *et seq.* in 1998, an event that, respondent infers,

"necessarily demonstrate[s]" the fact of California's previous noncompliance. Br. in Opp. 14, 15, 17-18.)

In truth, the right under California law to collateral representation in capital cases was created over thirty years ago, and its several sources are described—authoritatively—in *In re Sanders*, 21 Cal. 4th 697, 719 (1999): "(i) *In re Anderson*, 69 Cal.2d 613 [1969], (ii) [the California Supreme Court's] own Internal Operating Practices, (iii) policy 3 of the Supreme Court Policies [Regarding Cases Arising From Judgments of Death, effective 1989], and now (iv) Government Code section 68662 *all require*" the appointment of capital collateral counsel in capital cases. Without acknowledging this explicit and binding construction of state law, respondent seeks to undermine it by arguing that the California Death Penalty Policies (which, in 1989, accelerated the point at which the right to collateral counsel, created 20 years earlier, attaches) "are not . . . rules of court," and that they create an "irreconcilable conflict" with the IOPPs' authorization of collateral appointments "*after* the termination of the capital appeal," rather than *during* the pendency of the state's unitary review process. Br. in Opp. 18-19 (emphasis by respondent). Obviously, however, a provision of state law that affirmatively authorizes appointments after appeal does not "withhold" appointments at any other time (Br. in Opp. 20), and most especially does not do so at a stage of state proceedings during which state law otherwise explicitly ensures that representation *is provided*. Moreover, while respondent claims to be certain that the Policies are not "rules" of the California Supreme Court, he (like the Ninth Circuit) refuses to confront the most probative evidence available on the point: the fact that the California Supreme Court has explicitly referred to the Policies *as rules* no fewer than fourteen times. *Sanders*, 21 Cal. 4th at 704, 706, 707-711, 713, 716-721, 723. Similarly, he ignores Chapter 154's legislative history, which unambiguously shows that Congress *itself* regarded the California's Death Penalty Policies as a "rule of its supreme court." 137 Cong. Rec. S3221 (Mar. 31, 1991). The Policies' status as rules, of course,

is yet another predicate question of state law bearing directly on California's compliance with Chapter 154.

Respondent's argument (Br. in Opp. 17-18) that California's implementation of certain state procedural reforms in 1998 "necessarily demonstrate[s] that, at least prior to February 27, 1998, California had not complied with the prerequisites for Chapter 154 benefits" lacks all basis in logic and historical fact. First of all, California's reforms were instituted primarily to address a long-standing concern relating to delays in *state* practice, a concern that substantially predates, and exists quite independent of, the state's interest in seeing *federal* proceedings progress more expeditiously by application of Chapter 154. Indeed, the principal reconfiguration of state procedure occasioned by the 1998 reforms resulted from careful long-term study initiated well before Congress's enactment of Chapter 154, and well before the now-reversed panel decision in *Ashmus v. Calderon*, 123 F.3d 199 (1997), *rev'd*, 523 U.S. 740 (1998). *See Hill v. Butterworth*, 941 F. Supp. 1129, 1159 attach. n. 16 (N.D. Fla. 1996) ("Shevin Report" (Feb. 26, 1996)) (citing information respecting *then*-contemplated state reforms provided by the Executive Director of the California Appellate Project), *rev'd*, 147 F.3d 1333 (11th Cir. 1998). Of course, with reform, not regression, being the California legislature's overarching objective, it naturally avoided any changes in the law that would take the state *out* of compliance with Chapter 154. The exacting care with which that objective was fulfilled does not "demonstrate" earlier noncompliance.

To be sure, the 1997 panel decision declaring California noncompliant did shape some elements of the state's subsequent reform package, among them the legislature's directive that competency standards for collateral counsel be made "binding and mandatory," and that they be adopted by "the Judicial Council," not just by the California Supreme Court. See generally 123 F.3d at 1208 (erroneously characterizing Section 20 as "not a 'rule of court,'" and incorrectly assuming that the only "rules of court" under California law are those promulgated by the State Judicial Council); compare Cal. Gov't

Code § 68070 (authorizing *every* state court to makes *its own* rules, Pet. App. 94a). But with California's death row population burgeoning and there then being no assurance that the state's certiorari petition would be granted and the panel's decision reversed and ultimately vacated, California could scarcely risk ignoring what was (for then, at least) circuit law. Thus, the only thing "necessarily demonstrated" by the state's swift and prudent response was its awareness that the Ninth Circuit had issued an adverse *ruling*. Whether that ruling was *correct* remained an entirely different question, yet the state, at that point, had little choice but to effect at least one hyper-formalistic "change [in] existing law." See Br. in Opp. 18. By conforming to a judicial ruling, of course, a party does not prove its validity. Suggesting otherwise is sheer bootstrapping.

2. Finally, respondent tenders a protracted defense of the Ninth Circuit's refusal to certify any of the state law questions on which it issued mispronouncements. Br. in Opp. 22-32. Because the substance of the Ninth Circuit's most significant state law errors has been addressed previously with sufficient particularity, that subject merits no further discussion at this juncture. Indeed, because many of those errors are to varying degrees simply by-products of the court's misreading of Chapter 154 itself, see Pet. 26-27 nn. 11-13, some likely will never need to be addressed at all: If the Ninth Circuit's errors of federal statutory construction are corrected by this Court, we doubt the panel will again fail, on remand, to secure the California Supreme Court's guidance on any then-remaining disputed state-law questions.

Respondent otherwise resists certification on the ground that "interpretation of a federal statute, such as Chapter 154, presents a *federal* question properly decided by federal courts." Br. in Opp. 24 (emphasis by respondent). If the presentation of a "federal question"—hardly a novel attribute of the majority of cases landing in federal court—made certification of every predicate state-law question "unwarranted" or "inappropriate" (Br. in Opp. 25), one would be hard-pressed to identify any case in which certification might be deemed proper. Under the

express terms of Chapter 154, state compliance turns on the state of the state's *own* law—i.e., on the procedural attributes of a particular "mechanism" *created under state law*. It is therefore an inescapable fact (already demonstrated with regrettable frequency by the Ninth Circuit) that misapprehensions of pertinent state law will defeat correct resolution of the issue presented in this proceeding. See *In re Robbins*, 18 Cal. 4th 770, 793 n. 14 ("Contrary to the Ninth Circuit Court of Appeals' reading of [California law] in *Ashmus v. Calderon, supra,* 123 F.3d 1199, [*In re Clark,* 5 Cal.4th 750] does not limit counsel's duty to investigate—nor does it limit the availability of habeas corpus investigation funds—to 'claims that are discoverable by reference to the four corners of the appellate record' or claims that are 'revealed by the record'"); see also Pet. App. 33a ("From 1989 to 1998, . . . California's appointment mechanism was established only in its 1989 Supreme Court Policies and Rule XIII . . . of the IOPPs . . . of the Supreme Court of California"); see generally 123 F.3d at 1208 (failing to consider the rulemaking authority provided by Cal. Gov't Code 68070). Under these circumstances, continuing resistance to certification is especially misguided.

Respondent also submits that certification is unwarranted because the "cause pending" is the habeas attack he initiated in the district court and "questions . . . which relate[] to the Chapter 154 issue" will not "resolve[] the claims of federal constitutional violations raised" in that "underlying" challenge. Br. in Opp. 11, 27. Respondent, however, has appropriately *stipulated* that resolving "the Chapter 154 issue" "may materially advance the ultimate termination" of his habeas proceedings. Record, Doc. No. 254. Had that not been true, there would have been no basis for presenting "the Chapter 154 issue" to the Ninth Circuit in an interlocutory appeal—which is, in all events, the only "cause pending" in which certification was sought.

Finally, respondent resists certification by arguing (Br. in Opp. 29-30) that "regardless of whether" the Section 20 standards were adopted as rules, his state counsel "'never

received any orders to investigate collateral claims.'" "Accordingly," he claims, petitioner "cannot show that counsel was appointed, under any standards, to represent Mr. Ashmus in habeas corpus proceedings at any time from the appointment of direct appeal counsel in 1987 until the state court affirmed Mr. Ashmus' death sentence on direct appeal in 1991." He further suggests that his counsel were therefore "confus[ed]" about whether they had any duty to provide collateral representation. The record, however, plainly shows that the California Supreme Court ordered the appointment of respondent's counsel in 1987; the scope of that ordered appointment was extended to collateral representation by operation of state law in 1989; and in 1990—*during* the pendency of respondent's unitary proceedings—counsel explicitly *acknowledged* their duty to provide respondent with collateral representation, and sought an "extension of time" within which "to file a petition for writ of habeas corpus." State's C.A. Add'l Excerpt of Rec. 4-5. Neither "confusion" nor failure of appointment can explain counsels' failure to pursue collateral relief in the California Supreme Court, and nothing in the history of respondent's state proceedings will justify his resistance to certification of those distinctly state-law questions that underlie the compliance inquiry.

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The petition for writ of certiorari should be granted.

Respectfully submitted.

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